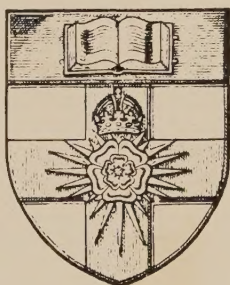


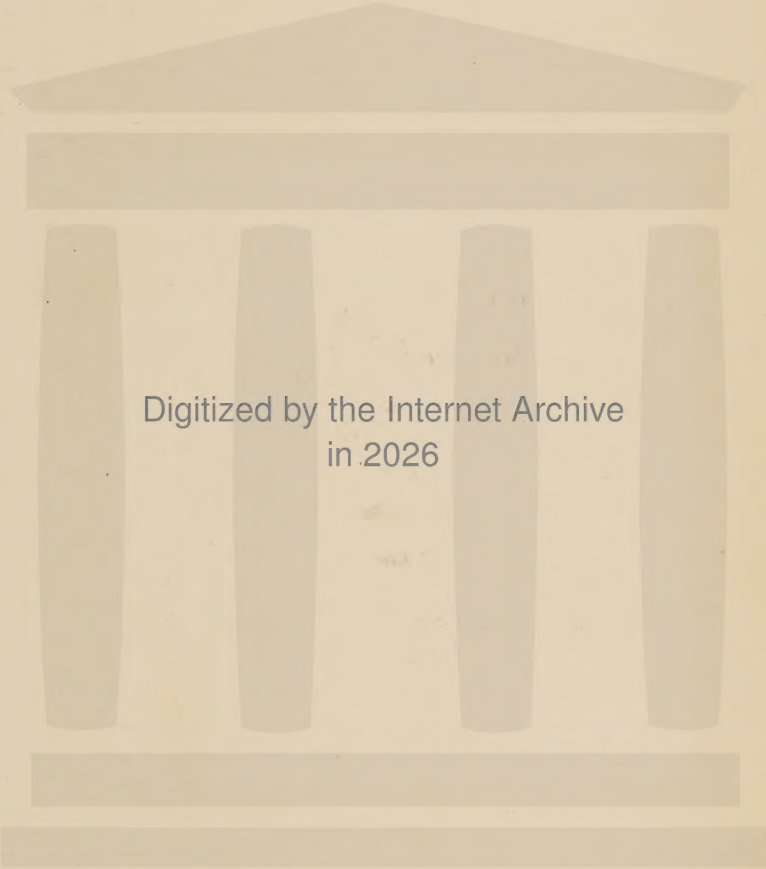
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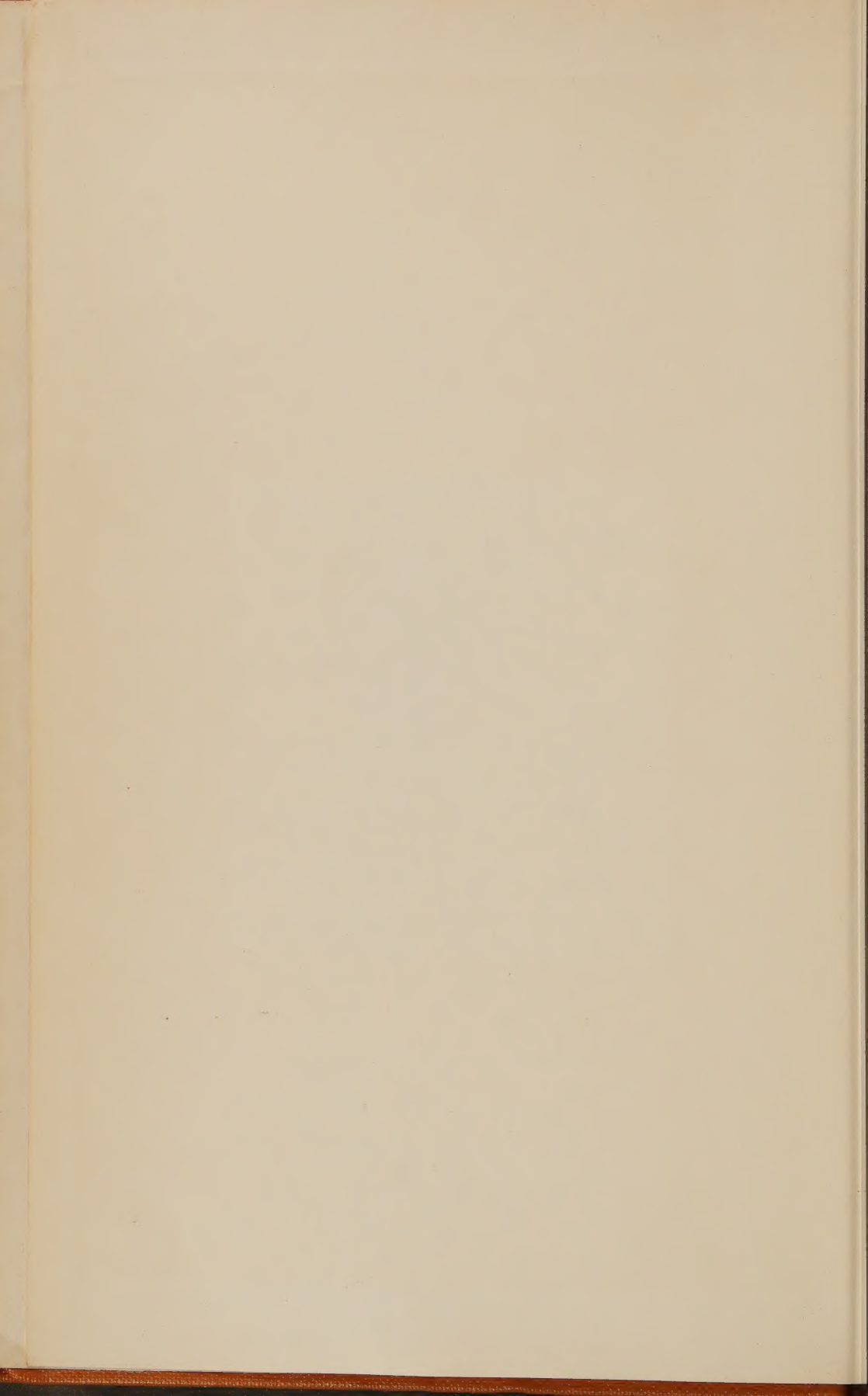
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1938.

THE
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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,
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PEERAGE CASES.

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1938.

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PERRARD CASES

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JUDGES, LAW OFFICERS, ETC.

MEMORANDA.

1937.

Dec. 14. THE HON. STEPHEN OGLE HENN COLLINS, C.B.E., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce, and Admiralty Division, and was afterwards Knighted.

Dec. 14. FRANCIS LORD CHARLTON HODSON, ESQ., M.C., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce, and Admiralty Division, and was afterwards Knighted.

1938.

Jan. 10. THE RIGHT HON. LORD ROCHE having resigned his office of a Lord of Appeal in Ordinary, THE RIGHT HON. SIR MARK LEMON ROMER, one of the Lords Justices of Appeal, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act, 1876, and was granted a Barony for life by the style and title of Baron Romer of New Romney in the County of Kent.

Jan. 10. SIR ALBERT CHARLES CLAUSON, C.B.E., one of the Justices of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal in the place of THE RIGHT HON. LORD JUSTICE ROMER.

Jan. 10. FERGUS DUNLOP MORTON, ESQ., M.C., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of THE HON. MR. JUSTICE CLAUSON, and was afterwards Knighted.

Feb. 24. This day SIR ALBERT CHARLES CLAUSON, C.B.E., Lord Justice of Appeal, was, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.

Mar. 15. THE RIGHT HON. DOUGLAS MCGAREL, VISCOUNT HAILSHAM, having resigned his Office of Lord High Chancellor of Great Britain, was appointed to be Lord President of His Majesty's Most Honourable Privy Council. His Majesty was thereupon pleased to deliver the Great Seal to THE RIGHT HON. FREDERICK HERBERT, LORD MAUGHAM, and the Oath of Office as Lord High Chancellor of Great Britain was, by His Majesty's Command, administered to him, and he took his place at the Board accordingly.

Mar. 28. SIR SAMUEL LOWRY PORTER, one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act, 1876, and was granted the dignity of a Baron for life by the style and title of Baron Porter of Longfield in the County of Tyrone.

Mar. 28. THE HON. CYRIL ASQUITH, K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards Knighted.

Apr. 1. This day THE RIGHT HON. SAMUEL LOWRY, BARON PORTER, Lord of Appeal in Ordinary, was, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.

May 6. This day THE HON. JAMES STRATFORD, Chief Justice of the Union of South Africa, was, by His Majesty's Command, appointed a Member of His Majesty's Most Honourable Privy Council.

A. C. 1938.

June 12. *This day* SIR LEWIS TONNA DIBDIN, D.C.L., sometime Dean of the Arches, died at Nobles, Dormansland, aged 85.

June 23. *This day* SIR DONALD BRADLEY SOMERVELL, O.B.E., K.C., M.P., Attorney-General, was, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.

July 11. *This day* THE RIGHT HON. SIR GEORGE JOHN TALBOT, lately a Justice of His Majesty's High Court of Justice, King's Bench Division, died at Falconhurst, Edenbridge, Kent, aged 77.

July 25. *This day* THE RIGHT HON. SIR THOMAS GARDNER HORRIDGE, lately a Justice of His Majesty's High Court of Justice, King's Bench Division, died at 62, Wilbury Road, Hove, aged 80.

Oct. 12. THE RIGHT HON. WILLIAM VISCOUNT FINLAY, K.B.E., one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal.

Oct. 12. SIR ARTHUR FAIRFAX CHARLES CORYNDON LUXMOORE, one of the Justices of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal.

Oct. 12. SIR RAYNER GODDARD, one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal.

Oct. 12. ROLAND GIFFARD OLIVER, ESQ., M.C., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards Knighted.

Oct. 12. REGINALD POWELL CROOM-JOHNSON, ESQ., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards Knighted.

Oct. 24. SIR HERBERT DU PARCQ, a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal, in the place of THE RIGHT HON. SIR FREDERICK ARTHUR GREER, resigned.

Oct. 24. WINTRINGHAM NORTON STABLE, ESQ., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of MR. JUSTICE DU PARCQ, and was afterwards Knighted.

Oct. 24. THE HON. MR. JUSTICE WROTTESELEY was appointed to be Ex-officio Commissioner for England under the Railway and Canal Traffic Act, 1888.

Nov. 4. *This day* THE RIGHT HON. WILLIAM VISCOUNT FINLAY, K.B.E., SIR ARTHUR FAIRFAX CHARLES CORYNDON LUXMOORE, SIR RAYNER GODDARD, and SIR HERBERT DU PARCQ, Lords Justices of Appeal, were, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took their places at the Board accordingly.

ERRATA.

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519	footnote (2).	[1920] P. 20.	[1920] P. 30.
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[1936] A. C.—Memoranda.

It should have been noted that on January 1, 1936, the Hon. Sir George Edward Rich, K.C.M.G., Senior Puisne Judge of the High Court of the Commonwealth of Australia, was appointed a Privy Councillor, and that on April 30, 1936, he was sworn of His Majesty's Privy Council and took his place at the Board accordingly.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

FENDER APPELLANT; H. L. (E.)*

AND

ST. JOHN-MILDMAY RESPONDENT. ¹⁹³⁷
April 15, 16, 19, 20, 22 ; June 28.

*Marriage—Breach of promise—Promise made by married man—
Promise made after decree nisi obtained by the wife but before decree
absolute—Whether promise enforceable—Public policy.*

A promise made by one spouse, after a decree nisi for the dissolution of the marriage has been pronounced, to marry a third person after the decree has been made absolute is not void as being against public policy, and an action for damages for breach of the promise is maintainable by the third person.

So held by Lord Atkin, Lord Thankerton and Lord Wright (Lord Russell of Killowen and Lord Roche dissenting).

Spiers v. Hunt [1908] 1 K. B. 720 and *Wilson v. Carnley* [1908] 1 K. B. 729 distinguished.

Decision of the Court of Appeal [1936] 1 K. B. 111 reversed.

**Present*: LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROCHE.

H. L. (E.) APPEAL from a decision of the Court of Appeal. (1)

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In 1930 the plaintiff, a young woman, met the defendant, who was, to her knowledge, a married man. In 1932 sexual intercourse began to take place between them. On January 16, 1933, the defendant's wife obtained a decree nisi for the dissolution of her marriage with him. On February 21 and in April, 1933, the defendant promised to marry the plaintiff when his wife's decree should be made absolute. On July 31, 1933, the decree was made absolute, but the defendant refused to marry the plaintiff. The plaintiff brought an action against the defendant claiming damages for breach of promise of marriage.

Hawke J., before whom the action was tried, held that the promise made by the defendant, who, notwithstanding the granting of the decree nisi, was under full marital obligation to his wife, was illegal and unenforceable as being against public policy, and accordingly held that the action was not maintainable.

On appeal the Court of Appeal (Greer L.J. dissenting) affirmed the decision of Hawke J. and dismissed the appeal.

The plaintiff by leave of the Court of Appeal appealed to this House.

Eddy K.C., *D.W. Conroy* and *Noordin* for the appellant. The doctrine of public policy invoked by Hawke J. and the majority of the Court of Appeal has no application to the facts of this case; indeed public policy regards the sanctity of contracts as of primary importance. Here the promise made by the respondent was that after the decree nisi was made absolute he would marry the appellant. How in these circumstances is public policy infringed by the respondent being held to his promise? While it has been held that adultery during the interval between the decree nisi and decree absolute is adultery during the marriage: *Hulse v. Hulse* (2), it was laid down by Lord Cairns L.J. in *Prole v. Soady* (3), that "the order nisi is the decree which the Court eventually makes

(1) [1936] 1 K. B. 111.

(2) (1871) L. R. 2 P. & D. 259.

(3) (1868) L. R. 3 Ch. 220, 225.

"absolute between the parties," thus showing that for the present purpose the decree nisi is the order alone to be regarded in order to ascertain the real position of the husband and wife. In *Ousey v. Ousey* (1) Sir James Hannen, after pointing out that in the Divorce Act, 1857, there was no decree nisi, proceeded to say that "the subsequent legislation, "by which the decree of dissolution was divided into two parts, "was not intended to give the respondent any greater "advantage, or in any way to alter her position, but to give "time for the Queen's Proctor and other parties to bring to "the knowledge of the Court any facts which would deprive the "petitioner of his inchoate right to have the decree made "absolute." This again points to the decree nisi as effecting the vital change in the relationship of the parties, with the consequence that there is no disloyalty, in this case to the wife, for the husband to promise to marry another woman. From the date of the decree nisi no duty was owing by the husband to the wife, and by promising to marry the appellant, the respondent caused no injury to the wife. Suppose the case of a husband and wife with several small children, and the wife runs off and commits adultery. What rule of public policy is violated if in those circumstances the husband should say to a woman: "Come and look after my children, "and I will marry you after I obtain a divorce"? Obviously none. In *Prevost v. Wood* (2) Darling J., while holding that the action in that case was not maintainable by reason of the suppression of facts in the Divorce Court by the promisee, appeared to think that there was nothing against public policy in the promise to marry the woman after the decree absolute. The question has been considered in the United States Courts. In *Noice v. Brown* (3) Beasley C.J. of New Jersey held that a promise by a married man to marry another woman when a divorce was decreed in a suit then pending between himself and his wife, was contrary to public policy and void; but it is to be observed that no decree in fact had been pronounced, and further, the decision was over

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(1) (1875) 1 P. D. 56, 63.

(3) (1876) 20 Amer. Rep. 388;

(2) (1905) 21 Times L. R. 684.

23 Amer. Rep. 213.

H. L. (E.) sixty years ago. The like criticism applies to the earlier American decision in *Paddock v. Robinson*. (1) The two cases in our Courts—*Spiers v. Hunt* (2) and *Wilson v. Carnley* (3)—are distinguishable, as in each of them the promise to marry was made by a married man to take effect after the death of his wife, and in the first case it was expressly found that the promise was made to induce the promisee to commit adultery with him. In those circumstances it was held to be against public policy to enforce the promise, but it is to be noted that Phillimore J. there said (4) that he came “to the conclusion that in general such a contract “as this is against public policy and morals, and not to be “enforced,” and further as tending to produce separation between husband and wife, as was shown by *Cartwright v. Cartwright* (5); but obviously the judge visualized the possibility of circumstances in which the promise might be enforced. Further, the reasons there stated for refusing to enforce the promise have no application to the facts of the present case. The rule deducible from the authorities comes merely to this: that in general it is contrary to public policy for a married man, whose matrimonial status is unimpaired, to promise to marry another woman, and by the word “unimpaired” is meant that there has been no decree nisi pronounced. Public policy has no place where, as here, the promise was made after the decree nisi.

[LORD ATKIN. One objection to such a promise being enforceable may be that it tends to prevent a reconciliation between the spouses.]

The promise being conditional on the decree absolute being pronounced does not prevent the possibility of a reconciliation. In *Wild v. Harris* (6), where the defendant, who at the time was a married man, promised to marry the plaintiff, who was unaware that he was a married man, within a reasonable time but did not do so, it was held that the plaintiff was entitled to recover damages. In *Millward v.*

(1) (1871) 14 Amer. Rep. 112.

(2) [1908] 1 K. B. 720.

(3) [1908] 1 K. B. 729.

(4) [1908] 1 K. B. 724.

(5) (1853) 3 De G. M. & G. 982.

(6) (1849) 7 C. B. 999.

Littlewood (1) Parke B. considered it unnecessary to express an opinion on the point whether a promise by a married man to marry a woman after his wife's death was against public policy. As Sir George Jessel M.R. said in *Printing & Numerical Registering Co. v. Sampson* (2): "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." In the earlier case of *Richardson v. Mellish* (3) Burrough J. spoke of public policy being "a very unruly horse, and when once you get astride it you never know where it will carry you." Further, as was pointed out in *Evanturel v. Evanturel* (4): "the determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time." See also to the same effect *In re Mirams* (5); *Mogul Steamship Co. v. McGregor, Gow & Co.* (6); *Cleaver v. Mutual Reserve Fund Life Association.* (7) In *Janson v. Driefontein Consolidated Mines* (8) public policy was declared to be no safe or trustworthy ground for legal decision, and should not be extended. Lord Lindley in the same case reminded their Lordships of the weighty observations of Alderson B. and Parke B. in *Egerton v. Brownlow* (9) as to public policy being a very unstable foundation on which to build. The observations of Farwell L.J. in *Hyams v. Stuart King* (10) to the effect that "the doctrine of public policy is regarded nowadays as one rather for the Legislature than the Courts, although the Courts will not shrink from acting on it if the contract sought

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(1) (1850) 5 Ex. 775.

(2) (1875) L. R. 19 Eq. 462, 465.

(3) (1824) 2 Bing. 229.

(4) (1874) L. R. 6 P. C. 1, 29.

(5) [1891] 1 Q. B. 594.

(6) [1892] A. C. 25, 45.

(7) [1892] 1 Q. B. 147, 151.

(8) [1902] A. C. 484.

(9) (1853) 4 H. L. C. 1, 106, 123.

(10) [1908] 2 K. B. 696, 727.

H. L. (E.) “to be enforced leads to immorality or crime” should also be borne in mind. If that test is applied here it will be found that the promise if carried out would not have led to either of these results, but would in fact have regularized the relationship of the respondent and the appellant. [*Hyman v. Hyman* (1); *Baldwin v. Baldwin* (2); and *Wilson v. Wilson* (3) were also referred to.]

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Croom-Johnson K.C. and *P. B. Morle* for the respondent. The doctrine of public policy and its application to contracts, far from having been in any way cut down, is still a living branch of the law. Certain of the observations in *Janson v. Driefontein Consolidated Mines* (4) which have been relied upon on behalf of the appellant appear to have been based on the views of the judges in *Egerton v. Brownlow* (5), which were not adopted by this House. Again and again the expression “good of the State” has rightly been taken as the synonym of “public policy,” and if that is the test how can it be for the “good of the State” to enforce such a promise as that now founded on? As was said in an article on “Public Policy in English Law” in 38 *Law Quarterly Review*, at p. 218, where the cases are examined, “the doctrine of public policy” remains a most effective force in English law,” and has been recognized in many recent cases: see, for example, *North Western Salt Co. v. Electrolytic Alkali Co.* (6) and *Horwood v. Millar's Timber and Trading Co.* (7) These and other authorities make it clear that the Courts will refuse to enforce by legal process contracts which have a tendency to affect adversely public interests. Indeed, if there has been any change in the attitude of the Courts it has been in favour of the more rigorous protection of the public as opposed to individual rights. Analogies drawn from commercial contracts are not very helpful; moreover, they are vitally different from the contract of marriage, which creates not mere contractual relations but affects status and brings into

(1) [1904] P. 403, 406.

(2) (1919) 35 *Times L. R.* 616.

(3) [1920] P. 20.

(4) [1902] A. C. 484.

(5) 4 H. L. C. 1, 106.

(6) [1914] A. C. 461.

(7) [1917] 1 K. B. 305.

existence other persons who are not parties to the contract itself. The contract of marriage is not severed by the pronouncement of a decree nisi; the marriage is put an end to only by the decree absolute; there is no change of status till then. It follows, therefore, that a promise by a married man to marry another woman before his marriage has been dissolved by a decree absolute cannot be enforceable by the Courts. It is contended that the decree nisi is the crucial date to be considered. Why should it be so regarded any more than the date of the petition? It is plain that if the parties become reconciled the decree falls to the ground. The view we contend for is that which has been recognized in the United States: see Williston on Contracts, vol. iii., ss. 1741-1743; in the latter section it is stated in terms that "an agreement by a married man to marry another woman after a divorce not as yet granted from his present wife is illegal," and for that proposition several American cases are cited. The English cases of *Spiers v. Hunt* (1) and *Wilson v. Carnley* (2), in each of which a promise by a married man to marry another woman on the death of his wife was held unenforceable as being against public policy, should be followed. In the American case of *Paddock v. Robinson* (3) such a contract was put as dangerous and immoral. In *Wilson v. Carnley* (4) Vaughan Williams L.J. said that "this was a contract which had a tendency to make the defendant, who in the lifetime of his wife had promised to marry another woman, do something which was in contravention of the obligations which are recognised in this country as owing from a husband to his wife."

[LORD ATKIN. What is that "something" ?]

Something against public morality, something inconsistent with the tie which existed. In the same case Farwell L.J. said that "where one finds certain principles to have been always insisted upon by the Courts, as far back as the reports of their decisions extend, with regard to the obligations of marriage and the conduct incumbent upon married people,

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(1) [1908] 1 K. B. 720.

(2) [1908] 1 K. B. 729.

(3) 14 Amer. Rep. 112.

(4) [1908] 1 K. B. 729, 735.

H. L. (E.) "it would be most inexpedient now to depart from those
 1937 "principles which have always been regarded as essential in
 FENDER "the interests of public morality and the happiness of married
 v. "life." With regard to the argument based upon the observation
 ST. JOHN- of Lord Cairns L.J. in *Prole v. Soady* (1) that "it is impossible
 MILD MAY. "to hold otherwise than that the order nisi is the decree which
 "the Court eventually makes absolute against the parties,"
 it should be noted that in *Norman v. Villars* (2) Lord Cairns,
 then Lord Chancellor, pointed out that in *Prole v. Soady* (1)
 "it was not there intended to lay down as a broad rule that in all
 "cases, and for all purposes, the decree, upon being made
 "absolute, relates back to the date of the order nisi." In
Norman v. Villars (2) it was decided that the status of a
 married woman was not affected by the pronouncing of the
 decree nisi: see also *Ellis v. Ellis*. (3) Further, it has to be
 borne in mind that the Court has power to rescind a decree nisi
 on the application of the party who obtained it: *Rutter v.*
Rutter (No. 2). (4)

Eddy K.C. in reply. The argument for the respondent
 is that to enforce such a contract as this would offend against
 public morality. We say that it would have the contrary
 effect. How is public morality injured if the guilty husband
 and the woman he has promised to marry take early steps to
 regularize their position? The cases of *Spiers v. Hunt* (5)
 and *Wilson v. Carnley* (6) are clearly distinguishable on the
 ground that the promise in these cases was to take effect
 on the death of the wife; a clear case of disloyalty by the
 husband to the wife. Those decisions are not inconsistent with
 our argument, but if they are we challenge their correctness.

The House took time for consideration.

June 28. LORD ATKIN. My Lords, this is an appeal
 by the plaintiff from an order of the Court of Appeal, who by
 a majority affirmed a judgment of Hawke J. on the trial of

(1) L. R. 3 Ch. 220, 225.

(2) (1877) 2 Ex. Div. 359.

(3) (1883) 8 P. D. 188.

(4) [1921] P. 421.

(5) [1908] 1 K. B. 720.

(6) [1908] 1 K. B. 729.

the action before himself and a special jury. The action was for breach of promise of marriage. The jury found for the plaintiff for 2000*l.* damages. The learned judge entered judgment for the defendant, holding that the promise of marriage was unenforceable as being contrary to public policy. The defendant, who was married at the time, met the plaintiff at a nursing home where she was a nurse. He told her that he was unhappy with his wife : and later asked her whether, if his wife divorced him, she would marry him after the divorce. She consented and thereupon sexual relations took place between them. The wife petitioned for a divorce on the ground of his adultery with the plaintiff, and a decree nisi was pronounced on January 16, 1933. In February and April, 1933, the defendant promised to marry the plaintiff immediately after the decree had been made absolute. These are the promises for breach of which the present action was brought. The parties continued their relations until June, 1933, when by the agency of his solicitors' clerk the defendant intimated to the plaintiff he did not intend to marry her. The decree was made absolute on July 31, 1933. In August the defendant again repudiated his promise, and in May, 1934, married another lady. The question is whether a promise made by one spouse after a decree nisi has been pronounced to marry a third party after the decree has been made absolute is void on the grounds of public policy. I state it in these simple terms because it was not suggested in argument, and indeed could not be, that it made any difference whether the promise was made by petitioner or respondent, and if by the latter to the man or woman with whom the adultery charged in the petition had been committed. Is it then contrary to public policy that a promise made between decree nisi and decree absolute to marry after decree absolute should be enforceable? It is not without significance that there is no judicial authority on this matter. The nearest authority in the English Courts that has been found consists of two cases in 1908 which were not concerned with divorce proceedings but decided that promises made by a married man to a woman who knew he was

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H. L. (E.) married that he would marry her after the death of his wife were contrary to public policy and void. It will be necessary to refer to these cases later : but I propose in the first instance to say something upon the doctrine of public policy generally. My Lords, from time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The "unruly horse" of Hobart C.J. is commonplace. I will content myself with two passages both of which have the authority of the approval of Lord Halsbury. In *Janson v. Driefontein Consolidated Mines* (1), he cites this passage from Marshall on Marine Insurance : "To avow or insinuate that "it might, in any case, be proper for a judge to prevent a party "from availing himself of an indisputable principle of law, in "a Court of justice, upon the ground of some notion of fancied "policy or expedience, is a new doctrine in Westminster Hall, "and has a direct tendency to render all law vague and "uncertain." "Public policy," said Parke B. in *Egerton v. Brownlow* (2), "is a vague and unsatisfactory term, and "calculated to lead to uncertainty and error, when applied to "the decision of legal rights ; it is capable of being understood "in different senses ; it may, and does, in its ordinary sense, "mean 'political expedience,' or that which is best for the "common good of the community ; and in that sense there "may be every variety of opinion, according to education, "habits, talents, and dispositions of each person, who is to "decide whether an act is against public policy or not. To "allow this to be a ground of judicial decision, would lead to the "greatest uncertainty and confusion. It is the province of the "statesman, and not the lawyer, to discuss, and of the Legislature "to determine, what is best for the public good, and to provide "for it by proper enactments. It is the province of the judge "to expound the law only ; the written from the statutes : the "unwritten or common law from the decisions of our predecessors "and of our existing Courts, from text writers of acknowledged "authority, and upon the principles to be clearly deduced "from them by sound reason and just inference ; not to speculate

(1) [1902] A. C. 484, 491.

(2) 4 H. L. C. 1, 123.

“upon what is the best, in his opinion, for the advantage of the
 “community. Some of these decisions may have no doubt
 “been founded upon the prevailing and just opinions of the
 “public good; for instance, the illegality of covenants in
 “restraint of marriage or trade. They have become a part
 “of the recognised law, and we are therefore bound by them,
 “but we are not thereby authorised to establish as law every-
 “thing which we may think for the public good, and prohibit
 “everything which we think otherwise,” cited in *Janson v. Driefontein Consolidated Mines*. (1) I will add three other well known propositions: “It must not be forgotten that
 “you are not to extend arbitrarily those rules which say that a
 “given contract is void as being against public policy, because
 “if there is one thing which more than another public policy
 “requires it is that men of full age and competent understanding
 “shall have the utmost liberty of contracting, and that their
 “contracts when entered into freely and voluntarily shall be
 “held sacred and shall be enforced by Courts of justice”: per Jessel M.R. in *Printing & Numerical Registering Co. v. Sampson* (2). “Certain kinds of contracts have been held
 “void at common law on this ground—a branch of the law,
 “however, which certainly should not be extended, as judges
 “are more to be trusted as interpreters of the law than as
 “expounders of what is called public policy”; per Cave J. in *In re Mirams*. (3) “Public policy is always an unsafe and
 “treacherous ground for legal decision, and in the present case it
 “would not be easy to say on which side the balance of con-
 “venience would incline”: per Lord Davey in *Janson v. Driefontein Consolidated Mines*. (4) In the same case Lord Halsbury indeed appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law. I do not find, however, that this view received the express assent of the other members of the House; and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious

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(1) [1902] A. C. 484, 496.

(2) L. R. 19 Eq. 462, 465.

(3) [1891] 1 Q. B. 594, 595.

(4) [1902] A. C. 484, 500.

H. L. (E.) warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide. In popular language, following the wise aphorism of Sir George Jessel cited above, the contract should be given the benefit of the doubt.

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But there is no doubt that the rule exists. In cases where the promise is to do something contrary to public policy which for short I will call a harmful thing, or where the consideration for the promise is the doing or the promise to do a harmful thing a judge, though he is on slippery ground, at any rate has a chance of finding a footing. The contract is unreasonable to restrict a man's economic activities, to procure a marriage between two persons, to oust the jurisdiction of the court. These things are decided to be harmful in themselves. To do them is injurious to public interests. But the doctrine does not extend only to harmful acts, it has to be applied to harmful tendencies. Here the ground is still less safe and more treacherous. One cannot resist the tendency test. It was applied in this House in that remarkable case *Egerton v. Brownlow* (1), not indeed to a contract but to a condition. In that case the seventh Earl of Bridgewater had attached a condition to limitations under his will that if the person taking did not in his lifetime acquire the title and dignity of Duke or Marquess of Bridgewater the estates were to pass over from his heirs male to other parties subject to a like condition. The fulfilment of the condition of the grant of an honour by the Crown was of necessity lawful. But the majority of the learned Lords, Lords Lyndhurst, Brougham, Truro and St. Leonards, differing from Lord Cranworth, the Lord Chancellor, and from the advice of the majority of the judges, held that the condition was bad inasmuch as it had the tendency to cause the holder of the estates to use unlawful and corrupt means to secure the rank of a peer which involved public duties as legislator and

the like. I do not stay to comment. I doubt whether at the present day such a tendency would be held to exist or to invalidate such a condition. It has been negatived in recent times in the case of a similar condition of obtaining a baronetcy : *In re Wallace*. (1) The uncertainty of "tendencies" as a criterion of rights is illustrated by the rule much in vogue in earlier days and in other countries than our own that seamen could not validly insure their future wages, which then depended upon the ship earning freight. Such insurance would have a tendency, so it was supposed, to induce seamen to relax their efforts to bring the ship to port, being more interested one must suppose in those days in their wages than in their safety. This rule is expressly abrogated in our country by the Marine Insurance Act. But assuming, as we must, that the harmful tendency of a contract must be examined, what is meant by tendency? It can only mean, I venture to think, that taking that class of contract as a whole the contracting parties will generally, in a majority of cases, or at any rate in a considerable number of cases, be exposed to a real temptation by reason of the promises to do something harmful, i.e., contrary to public policy; and that it is likely that they will yield to it. All kinds of contracts provide motives for improper actions, e.g., benefits deferred until the death of a third party, and contracts of insurance. To avoid a contract it is not enough that it affords a motive to do wrong: it must surely be shown that such a contract generally affords a motive and that it is likely to be effective. "Tendency" I find defined in the Oxford Dictionary as a constant disposition to move or act toward some present end or purpose. I think that even in *Egerton v. Brownlow* (2) this element of what I may call "effective motive" was assumed by the majority. Thus Lord Lyndhurst (3): "What, then, would be the *practical result*" (the italics are mine) "of this state of things with reference to the proviso now under consideration? If an estate, in this case of great extent and value, is made to depend upon a creation or promotion

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(1) [1920] 2 Ch. 274.

(3) 4 H. L. C. 1, 162.

(2) 4 H. L. C. 1.

e.g. v. b.

H. L. (E.) "in the peerage, is it reasonable to suppose *speaking generally*
 1937 " (for we must so consider the subject and without reference
 FENDER " to particular individuals) that such a state of things would
 v. " not have at least a tendency to lead the party thus interested
 ST. JOHN- " to act, and without much inquiry, in accordance with those
 MILD MAY. " who could insure the permanence of the estate to his
 Lord Atkin. " descendants ; to induce him to support their opinions. . . .
 " That there may be exceptions, honourable exceptions, to such
 " an influence I do not mean to doubt." Lord Brougham (1) :
 " It is, therefore, idle to represent the condition . . . as not
 " likely practically and in fact to sway that conduct." Lord
 Truro (2) : " the law looks not to the probability of public
 " mischief occurring in the particular instance, but to the
 " general tendency of the disposition ; and if the law is to be
 " practically applied, it cannot be administered with reference
 " to the character of the individuals to whom the question may
 " relate." I think the substance of these judgments is that you
 must have a general rule, a general tendency to wrong to
 which there may be exceptions. But if the contract has to be
 applied to an act of social or other relations in which there
 will be generally no tendency to do wrong, though there may
 be exceptions, the contract will not be avoided. A rule is not
 proved by exceptions unless the exceptions themselves lead
 one to infer a rule.

The evil tendency in such a contract as the present has been expressed in various ways by the learned judges. Hawke J. said that the promise was inconsistent with the obligations of the subsisting marriage, and the mutual loyalty required in marriage. He also thought that the wife might have changed her mind and induced the husband to return to her. He seems to suggest an approval of the suggestion that such contracts have a tendency to create immoral relations.

Slessor L.J. appears to apply the principles which had been expressed by Phillimore J. in *Spiers v. Hunt* (3) and the Court of Appeal in *Wilson v. Carnley* (4) in respect of promises to marry another after the death of the promisor's

(1) 4 H. L. C. 178.

(2) Ibid. 196.

(3) [1908] 1 K. B. 720.

(4) [1908] 1 K. B. 729.

spouse. He cites Phillimore J. (1) : " The tendency of such a "contract is to make the husband in thought, if not in deed, "unfaithful to his wife. In certain cases it might even lead to "crime. Its very probable result is sexual immorality." He cites Vaughan Williams L.J., who said that such a contract, i.e., to marry after the death of the wife, had a tendency to make the husband do something which was in contravention of the obligations which are recognized in this country as owing from a husband to a wife ; Farwell L.J., who thought it was not only inconsistent with that affection which ought to subsist between married persons but was calculated to act as a direct inducement to immorality ; and Kennedy L.J., who said that it was against public policy as tending to immorality. He himself also thought that the contract was void because it must necessarily tend to prevent reconciliation. Greene L.J. thought that the contract in this case was void because it tended to induce the promisor to act contrary to the rules of morality ; it tended to encourage or facilitate immorality ; it also tended to prevent reconciliation. Inasmuch as the judgments below were largely based on the cases of *Spiers v. Hunt* (2) and *Wilson v. Carnley* (3) it is necessary to say something about those decisions. They were both cases in which a husband during the lifetime of his wife had promised to marry another woman on the death of his wife. In the first case the promise to marry after the death was express : in the second it was implied from the fact that both parties knew the wife to be alive. In the first case immoral relations followed the promise, in the second case there is no statement that they did. Husband and wife in both cases were living together in normal conditions, though in the former case the wife was already an invalid though she survived the promise seven or eight years. Here the judges appear to have thought that a promise made in such circumstances tended to cause immoral relations. They may be right ; speaking for myself I really do not know whether that result would follow as a rule. I can only say that if the lady yields to a promise with

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(1) [1908] 1 K. B. 724.

(2) [1908] 1 K. B. 720.

(3) [1908] 1 K. B. 729.

H. L. (E.) such an indefinite date she is probably of a yielding disposition, and it would appear difficult to predicate that immorality is either facilitated or accelerated by the promise. As to the suggestion that such a promise is bad because it tends to induce the husband to murder his wife, I reject this ground altogether. Alderson B. in *Egerton v. Brownlow* (1) incontinently classes such objections as ridiculous. They appear to afford another instance of the horrid suspicions to which high-minded men are sometimes prone. But I think that there is real substance in the objection that such a promise tends to produce conduct which violates the solemn obligations of married life. The obligations are not all included in the legal phrase, rendering conjugal rights. But it can hardly be doubted that a betrothal to another would almost necessarily interfere with, hamper and embarrass the married consortium which on the hypothesis is existing and will continue to exist. If the moral ideal and the legal obligation are expressed in the promise to love and to cherish it may well be doubted whether they can exist unimpaired in the presence of a betrothal to another.

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But what application has this reasoning to circumstances as they exist after decree nisi? Not only are the parties not living together but they are not entitled to require that conjugal rights should be restored. The consortium is broken. The petitioning spouse has in effect said: "you have in such a degree violated your marriage obligations that I am proposing to treat myself as free, and I obtain an order from the court which after six months, unless it is shown that I have done something to justify the court in interfering, will put our marriage to an end." It is said that the status of marriage exists until decree absolute. Of course it does. It is said that if either of the spouses has immoral intercourse with a third party he or she commits adultery. Certainly. That follows from the continued existence of the status of marriage. But let us consider how far the normal obligations and conditions of marriage continue in ordinary circumstances after decree nisi. They have disappeared: there is no consortium,

and the parties are living apart : they owe no duties each to the other to perform any kind of matrimonial obligation : the custody of the children has been provided for by the court : the maintenance of the wife, if petitioner, is similarly provided for : the petitioning spouse has said : "I have done with you." In these circumstances what possible effect can a promise to marry a third person have by way of interference with matrimonial obligations ? There is no single duty which is being observed by either to the other : and it appears to me merely fanciful to suggest that the public interests are in any respect being impaired. If a respectable man whose wife has fled with the lodger leaving the children in his charge engages himself to another respectable person to marry her as soon as he is free no public interests suffer. In my opinion they benefit. Similarly, in the converse case of a wife whose husband is living with another woman of whose child he is the father. Do either of these persons still owe any kind of duty to love or cherish the other spouse, to whom no doubt they are still married, or owe them any duty which in the interests of themselves or of the public will be impaired by a promise to marry a third person when free ? From the point of view of law it ought to be remembered as an essential factor in this discussion that by legislation it has been established that it is not contrary to public policy that married persons should obtain a divorce and not contrary to public policy that immediately after final divorce either of them should marry. To me I must confess it appears lamentable that the law should set its ban upon promises made to do a lawful act by persons who in the interval between the promise and its fulfilment do nothing, and are not induced by the promise to do anything, contrary to the public interests. I dismiss with some indignation the idea that public policy is involved on the ground that such promises tend to immorality. No doubt a promise to marry is one of the weapons of the seducer : but no one has yet sought to invalidate on this ground a promise to marry made by unmarried persons : and I am quite unable to see why any different view should be taken of promises to marry

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H. L. (E.) which only differ in respect of the short period six months or less which must elapse between promise and performance.

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It remains to consider the ground for avoiding such promises that they tend to prevent reconciliation. On this part of the case I would wish to refer to what I have already written on "tendency." If the public policy of enforcing contracts to do lawful acts is to be maintained, it must be defeated only where there is a practical danger of injury to the public by enforcing particular classes of contracts. There must be a general tendency to harm. This topic is sometimes discussed as though a petition for divorce and the proceedings taken to obtain a decree were casual steps in matrimonial life capable of being and indeed likely to be retraced at any time before decree absolute. In fact they constitute the most serious and deliberate decision which a man or woman now takes. I should say that it is very seldom that parties hurry into divorce. There is much consideration and much advice tendered before a matrimonial offence or offences are regarded as decisive. The fact, at any rate, is that in an enormous proportion of cases when once a petitioner has got as far as decree nisi no reconciliation does, or, in most cases, can take place. The parties have shown themselves not to be of a reconciling mind. No doubt figures could be obtained, but from the information available to the public it is obvious that the number of decrees nisi that are not made absolute in relation to those granted expressed as a percentage would be a minute fraction of 1 per cent. In other words, there are no facts upon which the alleged general tendency can act. The so-called exceptions are the rule and the working of the alleged rule is acutely exceptional. I, therefore, come to the conclusion that to enforce a contract such as that under discussion would harm no public interest, would leave all the obligations of marriage unimpaired : while the performance of the contract is innocent, in accordance with the policy of the law and in some circumstances very much to be encouraged.

I attach importance to repelling the attack upon such contracts, for I seem to detect a resurgence of ecclesiastical principles as expressed in ecclesiastical law which at one time

found favour with common law and certainly equity judges where they had to deal with separation agreements and which were finally repressed more than one hundred years ago. Separation agreements are indeed much more open to attack on the principles asserted in this case than the present class of contract : and they were assailed on grounds which might have been taken from the judgments in favour of the respondent in this case. In *Mortimer v. Mortimer* (1) Sir William Scott, speaking for an ecclesiastical court, said : " This Court " considers a private separation as an illegal contract, implying " a renunciation of stipulated duties—a dereliction of those " mutual offices, which the parties are not at liberty to desert— " an assumption of a false character, in both parties, contrary " to the real status personae, and to the obligations which both " of them have contracted in the sight of God and man, to live " together ' till death them do part,' and on which the solemnities " both of civil society, and of religion, have stamped a binding " authority, from which the parties cannot release themselves " by any private act of their own, or for causes, which the law itself " has not pronounced to be sufficient, and sufficiently proved. " These Courts, therefore, to which the law has appropriated " the right of adjudicating upon the nature of the matrimonial " contract, have uniformly rejected such covenants, as insignifi- " cant in a plea of bar ; and leave it to other Courts to enforce " them, so far as they may deem proper upon a more favourable " view (if they entertain it) of their consistency with the princi- " ples of the matrimonial contract." In other words, in the ecclesiastical courts a present agreement to live separate was no bar to a suit for restitution of conjugal rights. The language of this distinguished judge undoubtedly found a sympathetic response in the mind of his equally distinguished brother Lord Eldon, whose sad fate it was as presiding over those " other " Courts " to which Lord Stowell referred to have to enforce the contracts which the latter so vividly described.

His own agreement he barely conceals : see *St. John v. St. John* (2) ; *Westmeath v. Westmeath*. (3) But that Courts

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(1) (1820) 2 Hagg. Cons. 310,
318.

(2) (1805) 11 Ves. 526, 537.

(3) (1821) 1 Jac. 126, 140.

H. L. (E.) of equity would enforce such agreements was established in this House in *Wilson v. Wilson* (1) ; and the final emancipation of law and equity from ecclesiastical domination in this respect was established by the judgment of Lord Westbury in *Hunt v. Hunt* (2) in reversing the decision of the Master of the Rolls, Lord Romilly, who had refused to grant an injunction to restrain a husband from bringing a suit for restitution of conjugal rights in breach of a covenant by him in a separation agreement. "Before the Reformation," said Lord Westbury, "as we all know, marriage was regarded by the Church, and therefore regarded by the law, as a sacrament. It was a contract of the highest possible religious obligation. All its duties and the obligations which it created were matters of ecclesiastical cognisance, and above all it is to be recollected, if I am not mistaken, that the duty of cohabitation—the primary duty arising from the contract—was enforced by the spiritual tribunal by spiritual punishments, acting as they did pro salute animae. It was therefore quite correct to say anterior to the Reformation, in speaking of the policy of the law, that voluntary separations were forbidden by law, and that contracts made for giving effect to voluntary separations were therefore invalid, as being contrary to the policy—that is, contrary to the prohibition—of the law. But then came the Reformation and the Statute of Henry VIII., which, providing for that which unhappily never took place, the revision of the common law, enacted that the rules of the ecclesiastical law should prevail, as far as they were not contrary to the common law. The ecclesiastical law and the rules and doctrines of the Courts Christian, were therefore subordinated to the common law, and what the common law did not prohibit in the ordinary relations of life could no longer be dealt with as an offence by the ecclesiastical law. As expressed by one of our older writers the ecclesiastical law was thenceforth put sub graviore lege. Then, by the common law, voluntary separation, that is, the cessation by mutual agreement of the consortium vitae of matrimony, was not a thing forbidden,

(1) (1848) 1 H. L. C. 538 ; (1854) 5 H. L. C. 40.

(2) (1862) 4 De G. F. & J. 221, 226.

"prohibited, or in any manner made the subject of punishment. H. L. (E.)
 "It seems to me, therefore, impossible to say after the Reforma- 1937
 "tion, as a general proposition, that voluntary separations were FENDER
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Now if that be true of an agreement between the spouses Lord Atkin.
 is it not straining at good sense to declare to be contrary to the policy of the law an agreement which does not in itself directly affect the matrimonial relations, which takes account of a judicial decree which has for practical purposes the effect of a separation order, and which creates an obligation to do that which the law permits and indeed often welcomes?

It is said that there is a class of contract,—namely, contracts to marry another person made during the marriage of the promisor which have been decided to be void: that the contract in question is such a contract, and that no further discussion is possible. The major premise, with great respect, is unsupported by authority. The only authority, namely, the two cases of *Spiers v. Hunt* (1) and *Wilson v. Carnley* (2), is concerned with cases where the spouses are living together, and the promises were to be fulfilled after the death of one spouse. It appears to me wrong to assume that the doctrine of public policy applies to any class of contract without regard to the public mischief on which the decision or decisions are based. I have pointed out that all the material circumstances which lead to mischief in the one case, are absent in the present: for the simple reason that after decree nisi the bottom has dropped out of marriage: in Greer L.J.'s words, with which I agree, nothing but a shell is left. I do not myself understand a doctrine of public policy which is merely founded on a statement that one contract is inconsistent with or incompatible with another. I venture to say that the doctrine is unmeaning unless the impugned contract leads or is likely to lead to injurious action: and I have pointed out that this cannot be predicated of these contracts in the circumstances in which they are made. The whole notion of any danger to public interests seems to me fanciful and unreal. For these reasons I think that public policy demands that these contracts should

(1) [1908] 1 K. B. 720.

(2) [1908] 1 K. B. 729.

H. L. (E.) be enforced, and that this appeal should be allowed and judgment entered for the plaintiff for the amount found by the jury.

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LORD THANKERTON. My Lords, on January 16, 1933, the respondent's wife obtained a decree nisi for the dissolution of their marriage, on the ground of his adultery with the present appellant. On February 21, 1933, the respondent promised to marry the appellant immediately after the decree had been made absolute. This promise was repeated in April, 1933. The decree nisi was made absolute on July 31, 1933. The respondent thereafter failed to implement his promise, and the question is whether the Court is entitled to enforce the promise so as to enable the appellant to recover damages for its breach.

The Court of Appeal, Greer L.J. dissenting, has held that public policy disables the Court from enforcing such a contract, thereby affirming the judgment of Hawke J., before whom the case was tried.

One of the constant principles of public policy in this country, which it is the duty of the Courts to maintain, is that of freedom of contract; but it is certain that there are some classes of contract, whose characteristics are such that their enforcement by the Courts is barred by a paramount principle of public policy. Generally, it may be stated that such prohibition is imposed in the interest of the safety of the State, or the economic or social well-being of the State and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits.

Where, as in the present case, the principle invoked may be said to relate to the social conditions of the people, one is necessarily led to scrutinize the decided cases, to discover whether the principle has been clearly defined, and the reasons assigned for the enforcement of the principle in the particular case may be very helpful in determining the limits of the

policy by ascertainment of the social evils, the prevention of which was held to be in the interest of the State and its people.

My Lords, the principle of public policy relied on by the respondent concerns the freedom of contract of married persons, and the number of decided cases on this subject are very limited. There are only two cases in the Court of Appeal in 1908 relating to a promise of marriage by a married person given to a third party, and the only other cases bearing on this matter are those relating to separation agreements. Beyond the general principle that the law will not enforce contracts which will induce one of the parties to do something against the general rules of morality, which applies to contracts generally, I have been unable to find a clear statement of any principle of public policy as to protection of the married state, in any one of these cases, except in references to the American decisions, to which I will refer later.

I have had the privilege of considering the opinion which my noble and learned friend on the Woolsack has just delivered, and also the opinions about to be delivered by my noble and learned friends. I have anxiously and carefully considered them, and, after much thought, I have arrived at a decided view on the matter. I find it unnecessary to go through all the cases in detail, as they have been fully dealt with in these opinions.

In the first place, there can be little question as to the proper function of the Courts in questions of public policy. Their duty is to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy. Such a case might well arise in the case of safety of the State, for instance. But no such case is suggested here. Further, the Courts must be watchful not to be influenced by their view of what the principle of public policy, or its limits, should be.

It is conceded that public policy prevents the enforcement of a promise of marriage by a married person to a third party made prior to the decree nisi, but the appellant maintains

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H. L. (E.) that the principle no longer applies after the decree nisi is pronounced. While, on the one hand, the marriage tie is not dissolved until the decree is made absolute, and misconduct with a third party still constitutes adultery, the consortium vitae of the spouses is suspended from a stage prior to the decree nisi, and the petitioning spouse has done all he or she can or need do, except, after the expiry of the necessary period, to apply to have the decree made absolute. It is true that, if a reconciliation is effected during the intervening period, the parties will remain married, and the consortium will be resumed.

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Now, my Lords, it is somewhat natural to the logical mind, to expect the principle to be the broad one of protection of the sanctity of the marriage tie, as being one of the essential institutions of a Christian and monogamous people, and that, therefore, every act which would impair such sanctity would be barred by the principle so long as the marriage was undissolved. I confess that I was much impressed by this view, but the fact is that the breadth of such a principle is, in my opinion, seriously affected by the settled law as to the lawfulness of separation agreements, for, though separation is a breach of one of the primary obligations of marriage, they have been treated as lawful, unless they were merely contingent on a future state of separation. Such agreements negative the consortium vitae, which is intended not only to preserve the happiness of the spouses but also to conserve and further the interests of the children, a very important consideration. They may also tend to prejudice the possibility of reconciliation, though it is true that in some cases they will provide the only possible hope of a reconciliation.

This consideration makes clear to my mind, with all respect to my noble and learned friends who hold a contrary view, that there is no general principle of public policy that no contract is enforceable, which is inconsistent with maintenance of the obligations of the marriage tie, or, to phrase it otherwise, with loyalty to the other spouse. I am therefore not surprised, on consideration of the cases of *Spiers v.*

Hunt (1), and *Wilson v. Carnley* (2), to find that these decisions are mainly based on the general tendency of the contracts under consideration to immorality or crime. In both these cases a spouse promised to marry a third party after the death of his wife, a future and uncertain point of time. The only other ground of these decisions rests upon the reference to the opinion of the Chief Justice in the American case of *Noice v. Brown* (3), which is based on protection of the married state. But, in my opinion, the law in this country as to separation agreements is inconsistent with the American law, as stated by the Chief Justice. There can be no justification for expanding the principles of public policy in this country by reference to the public policy of another country.

My Lords, once the decree nisi has been pronounced the petitioner, as I have already stated, has done all that he or she can do in order to obtain dissolution of the marriage tie, except to apply, after expiry of the statutory period, for the decree absolute. The guilt of the respondent has been judicially determined. The waiting period is imposed in the public interest, in order to insure that there has been full disclosure before the Court. If intervention takes place and is successful, the decree absolute will not be obtained, and the promise of marriage will be nugatory. If the intervention is unsuccessful, the position as at the date of the decree nisi will be ratified.

It follows from the view that I have expressed that the question is not whether the present case is an exception to a general rule, but whether a contract of this kind has the same general tendency as those which were under consideration in the cases of *Spiers v. Hunt* (1) and *Wilson v. Carnley*. (2)

In my opinion, after careful consideration, I am unable to find the same general tendencies in the present case. Public policy is not concerned with tendencies that may exist in a very limited number of cases; and I am satisfied that the tendency to prejudice the possibility of a reconciliation is of

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(1) [1908] 1 K. B. 720.

(2) [1908] 1 K. B. 729.

(3) 20 Amer. Rep. 388; 23
Amer. Rep. 213.

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such rare occurrence that the Courts would not be justified in relying on that ground as a basis of their refusal to enforce a contract. There is no suggestion that such a contract involves any tendency to crime. There remains the question of immorality, and it is in this regard that I find a vital distinction between a promise to marry on the contingency of a dies incertus, and a promise to marry on the decree nisi, already in existence, being made absolute. The general tendency of the latter, I should assume, will be to promote patience until the expiry of a period, which, in the vast number of cases, is practically mechanical in its operation. In the case of the petitioner this seems obvious; in the case of the respondent's promise to a co-respondent, the existence of immorality is not likely to be affected. In the case of the respondent's promise to an innocent third party, I should conceive that, in general, such a promise would not create a tendency to immorality.

I am therefore of opinion that the respondent has not shown that there is any existing principle of public policy which involves the refusal of the Courts to enforce the promise of marriage given by him, and that he is liable to answer to the appellant for his breach of that promise.

LORD RUSSELL OF KILLOWEN. My Lords, the learned counsel for the appellant, in opening this appeal, said that the question for our decision was whether it was against public policy for a husband (whose wife had obtained a decree nisi for the dissolution of their marriage) to promise to marry the woman whom he had involved in the proceedings, if and when the decree nisi had been made absolute.

That no doubt states accurately the question, in terms of the facts of this particular case; but the actual question which is raised is much more general, and of far wider application. It concerns equally a promise to marry made by an innocent petitioner, and a promise by a guilty respondent to marry some one in no way involved in the matrimonial suit. The question is fundamentally the same question which was decided nearly thirty years ago by the Court of Appeal

in *Wilson v. Carnley* (1)—namely, whether a contract made by a married person whose spouse is still living, to marry some third person when free to do so by the termination of the existing marriage, is a contract contrary to public policy and therefore unenforceable. The facts of the present case differ from those in *Wilson v. Carnley*. (1) There the contemplated termination of the existing marriage was by the death of the living spouse : in this case it is by the decree absolute.

No one contended before your Lordships that *Wilson v. Carnley* (1) was wrongly decided and should be overruled. It was accepted as correct. It was conceded that the general rule of English law was that a married person cannot during the life of his or her spouse validly contract to marry another person ; but it was said that this rule did not apply if the contract was made after decree nisi pronounced in a suit between the spouses.

For this alleged exception to the general rule no authority exists. It arises for decision for the first time in this case. It is a question the answer to which must, I fear, depend to some extent upon the view taken as to the importance to a civilized community both of the maintenance of the married state, and (if the ideal of permanence be excluded) the durability of the marriage tie.

My Lords, when England was a Catholic country matrimony was a sacrament, conferred upon themselves by the spouses. This sacramental nature of marriage, the holy state of matrimony, was the basis of the civil law of Europe with regard to it. When in the reign of Elizabeth England abandoned the old faith, and became a Protestant country, matrimony ceased, according to the new dispensation, to be ranked among the sacraments of the Gospel. The 25th of the 39 Articles so provided. The status of marriage became the product or result of a contract between the parties. But the obligations resulting from the status, the solemnity of the status, the importance to a civilized community of its maintenance remained almost unimpaired. Until the first Divorce Act in 1857 the marriage tie was indissoluble except by

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legislation. The question now arises whether as a result of that Act and subsequent divorce legislation, there has come about such an alteration in the public view of the status of marriage, its obligations, and the importance of its maintenance, that without any offence to public policy or public opinion, a spouse may validly contract to marry another, provided only that the jurisdiction of the Divorce Court has been invoked in relation to his or her existing marriage.

My Lords, I use those words advisedly, because, as it seems to me, every argument for the appellant which depends upon the existence of a decree nisi, is applicable to a case where the suit has not yet proceeded beyond the presentation of the petition. The decree nisi as I understand it effects nothing. It does not dissolve the marriage. The parties are just as much man and wife as they were before. It is true that the right to consortium could not be enforced; that duty or obligation between spouses is no doubt in suspense. So it is once a petition for divorce has been presented. Other duties or obligations, however, remain. The duty or obligation to refrain from sexual intercourse with others, surely continues. To break it would be to commit adultery, just as much as to marry another would be to commit bigamy. I confess that I do not understand how the existence of a decree nisi is really relevant or essential to this case. The parties at the time of the contract are either married or not. If they are married, can either of them, while still married, enter into an enforceable contract to marry some one else?

Let me now examine *Wilson v. Carnley* (1) and see what were the grounds upon which that decision was based. Vaughan Williams L.J. describes the question involved as "the abstract question whether a promise to marry a woman made by a married man in the lifetime of his wife can be enforced"; and after citing a passage from the judgment of Phillimore J. in *Spiers v. Hunt* (2) he says: "I also am of opinion that such a contract is one which cannot be enforced: and, personally, I am of opinion that such a contract is one which ab initio cannot be enforced, and that it does not matter at what time

(1) [1908] 1 K. B. 729, 733, 734. (2) [1908] 1 K. B. 720,

"or after the happening of what contingencies the action is brought, the contract being one which at no moment of time the Court would enforce." And after a reference to an anticipatory breach of such a contract he reiterates: "In my opinion such a contract is against public morality, and is void ab initio, and never at any time can be enforced in the Courts of this country." He again refers to *Spiers v. Hunt* (1) and agrees with Phillimore J. that such a contract is within the language of Sir George Jessel in *Printing & Numerical Registering Co. v. Sampson* (2) as a contract which will induce one of the parties to do something against the general rules of morality. Although the words here used are "will induce," the Lord Justice makes it clear that in his opinion a tendency to induce is sufficient, for after a reference to a contention by counsel based upon *Egerton v. Brownlow* (3) he continues: "But, though the doctrine may have been carried too far, there is no case in which it has been suggested that a contract which has a tendency to induce one of the parties to it to do something contrary to the general rules of morality is not a contract which the Courts may refuse to enforce upon that ground. I have no doubt that this was a contract which had a tendency to make the defendant, who in the lifetime of his wife had promised to marry another woman, do something which was in contravention of the obligations which are recognized in this country as owing from a husband to his wife. It is sufficient to say that this is obviously a contract which a husband in his wife's lifetime could not enter into without being disloyal to his wife . . . it is a contract against public policy as tending to make the husband disregard the acknowledged rules of morality as to married life, and therefore cannot be enforced."

My Lords, I think that Vaughan Williams L.J. in his judgment, with its references to public morality, to the general rules of morality and to disloyalty to a spouse, does not mean to base his decision solely on the tendency of the contract to produce adultery. He is taking a much broader view as to the conduct and loyalty which is required by public opinion

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(1) [1908] 1 K. B. 720.

(2) L. R. 19 Eq. 462, 465.

(3) 4 H. L. C. 1.

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to be displayed by each spouse during the continuance of the marriage tie. The bare idea of a spouse becoming one of an engaged couple, and indulging, or at any rate likely to indulge, in the affectionate familiarity which is natural and usual between engaged couples, is an idea inconsistent with the existing marriage tie, and disloyal to the living spouse. Those elements are, I think, included in his view that the tendency of the contract was to make the spouse do something in contravention of the obligations owing from one spouse to the other.

Farwell L.J. seems to base his decision more explicitly upon the view that the contract was calculated to act as a direct inducement to immorality (meaning, I think, on the context adultery), and might also lead to crime.

Kennedy L.J. refers both to the contract as tending to immorality (meaning, I think, adultery), and as an incentive to crime ; but he also refers in more general terms to its derogation from the sense of the obligations involved in the status of marriage. While the foundation of his decision is the tendency to adultery and crime, his judgment is not inconsistent with the broader view which, I think, is the basis of the judgment of Vaughan Williams L.J.

I must also refer to *Spiers v. Hunt*. (1) In that case I think that Phillimore J. took the same broad view as that taken by Vaughan Williams L.J. in *Wilson v. Carnley*. (2) He describes the contract as against public policy and public morals. He agrees with the views which Lawrence C.J. of the State of Illinois expressed in *Paddock v. Robinson* (3) that to hold such a contract valid would be to introduce into social life a dangerous and immoral principle, and he cites with approval the following extract from the judgment in that case of the learned Chief Justice: "Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are, in themselves, a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life,

(1) [1908] 1 K. B. 720.

(2) [1908] 1 K. B. 729.

(3) 14 Amer. Rep. 112.

“and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong—a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognized as valid in a court of justice.” Phillimore J. goes on to point out that such a contract has a tendency to make the husband in thought if not in deed unfaithful to his wife; that it might even lead to crime; and that its very probable result is sexual immorality. It is, however, clear in my opinion from his approval of what was said by Lawrence C.J. that Phillimore J. took the broader view, and considered the contract void as against public policy on general grounds (apart from any tendency to specific acts such as adultery or crime) because it involved a moral breach of the existing marriage tie, and disloyalty to the living spouse.

If *Wilson v. Carnley* (1) was, as I think it was, rightly decided, I cannot see how the existence of a decree nisi can make any difference in law. The petitioner and respondent are still husband and wife. The marriage tie still binds them. They are still under marital duties and obligations, though some may be in suspense. It is said that the marriage status has been impaired by the decree nisi. This is language which I do not understand. If it means that the marriage tie has been weakened, or that the parties are less man and wife than they were before, it is simply untrue. If it only means that the petitioner in obtaining a decree nisi has indicated a then existing intention to have the marriage dissolved, it is true but irrelevant to the point under discussion. The petitioner may change her or his mind. But, it is said, there has been brought about a vital change in the position of the parties; the petitioner here by obtaining her decree nisi has thrown off her husband, and with the result that there can exist no longer any question of loyalty between the parties. My Lords, that is a proposition which I utterly deny, for when examined it can in law only mean that the petitioner by obtaining a decree nisi has displayed her intention to bring about that condition of affairs.

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H. L. (E.) But presenting her petition displayed just the same intention, and involved the suspension of some marital obligations, and is it to be said that notwithstanding *Wilson v. Carnley* (1) she could then immediately enter into a binding contract to marry? And if the matter depends upon intention, as seems to be the case, could she do so, on discovering her husband's infidelity and resolving to petition for the dissolution of her marriage? The answer must in each case, in my opinion, be "no"; and for the same reason, as in the present case—namely, that present intention to end a marriage is irrelevant, and that until the marriage tie has in fact and in law ceased to exist, and until the person in question has ceased to be a spouse, a contract by him or her to marry is a contract against public policy and morals, to the enforcement of which the law will not lend itself.

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In my opinion the reasons given in *Wilson v. Carnley* (1) apply to the present contract, with the exception of one—the tendency to induce the commission of a crime.

The tendency to the commission of adultery, it must be conceded, cannot be so strong as in a *Wilson v. Carnley* case (1), owing to the interval of waiting being ordinarily of shorter and less uncertain duration. But the tendency is there; and we must remember that we are deciding a point of law which has relation to all classes and all cases, including those in which a period of time considerably longer than six months may elapse between the decree nisi and the dissolution of the marriage. Nor can it, I think, be denied that the mere fact that the person who promises marriage makes the promise notwithstanding that he or she is at the time of the promise the spouse of some one else, indicates a strong desire on the part of the person who makes the promise.

But, my Lords, there exists in the present case a reason, non-existent in *Wilson v. Carnley* (1), and in my opinion of the gravest import, why this contract should be held to be one against public policy. It has, I think, never been doubted that public policy requires that the married status should as far as possible, as long as possible and whenever possible be

maintained. The policy of the law which forbids contracts which contemplate a future separation of spouses is founded, as Turner L.J. pointed out in *Cartwright v. Cartwright* (1), on "the importance to society of maintaining" the relationship of husband and wife. Again, we must bear in mind all classes of cases. It is in the interests of the State that family life should be maintained, and that homes should not be broken up by the dissolution of the marriage of parents. But even in the absence of children, it is in the interest of the State that if possible the marriage tie should remain stable and be maintained. As was well said by Beasley C.J. in the American case of *Noice v. Brown* (2): "The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws." In my opinion, any contract, the effect or tendency of which would be to create an obstacle or bar to the reconciliation of husband and wife, must necessarily be a contract against public policy. In divorce proceedings nothing is final until decree absolute. Up to that time there is always the possibility, I put it no higher than that, of a reconciliation, and of that being maintained which it is in the interest of the State to maintain—namely, the marriage tie. A contract by a spouse made in the course of divorce proceedings to marry some one else must from its very nature create a serious obstacle or bar to any chance of the existing marriage tie being maintained; its tendency as regards the contracting spouse must be against reconciliation, and he or she could only join in a reconciliation subject to the risk of a claim for damages at the suit of the promisee. For this reason, apart from the others which I have indicated and which are founded on *Wilson v. Carnley* (3), I am of opinion that the contract sued upon in the present case is unenforceable.

I disagree entirely with the views expressed by Greer L.J. to the effect that a decree nisi relieves both the petitioner and respondent from all the duties and obligations arising out of

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(1) 3 De G. M. & G. 982, 990.

(3) [1908] 1 K. B. 729.

(2) 20 Amer. Rep. 388, 389.

H. L. (E.) the marriage, and that it puts an end to the whole content of the marriage contract, leaving only the technical bond. I can only repeat with what emphasis I can command, that in my opinion while some of the duties and obligations may be suspended from the presentation of the petition, the marriage bond remains unimpaired and unloosened until the decree absolute ; it is then, and only then, that according to the municipal law of this country the marriage is determined by dissolution, and the former husband and wife cease to be married persons.

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I agree with the judgments of Slessor and Greene L.JJ. in which they both point out how and why such a promise as is here in question must necessarily tend to hinder reconciliation between the spouses ; and I further agree with them in thinking that the rarity of reconciliation after the commencement of divorce proceedings, if it be in fact a rarity, is an irrelevant consideration, in deciding this question of law.

My Lords, as I see this case, there is here no question of inventing a new rule of public policy. It is only an illustration of an old rule applied to new facts. In the cases which have hitherto arisen in this country the existing marriage was to be determined by death. In this case it is to be determined by divorce. The reasons, or some of them, which invalidated the contract in *Wilson v. Carnley* (1) apply in my opinion equally to a contract made during the pendency of divorce proceedings to marry after decree absolute, and are in the case of such a contract reinforced by the fact that the contract is an obstacle or bar to the reconciliation of the spouses. For the reasons which I have endeavoured to indicate I would dismiss this appeal.

Counsel for the appellant contended that the solemnity of the institution of marriage was in no way involved in the appeal, and that the tendency of his argument was to uphold the marriage tie. With all respect to him and those who share his view I cannot agree. The institution of marriage has long been on a slippery slope. What was once a holy estate enduring for the joint lives of the spouses, is steadily assuming the

(1) [1908] 1 K. B. 729.

characteristics of a contract for a tenancy at will. For myself I am glad that the opinion which I have formed of the law which is applicable to this case coincides with the view that the obligations of married persons do not cease in the eye of the law until in the eye of the same law those persons cease to be married; and that the married state so long as it lasts is still a status of sufficient solemnity to justify the words of Farwell L.J. when he said in *Wilson v. Carnley* (1): "Speaking for myself, I find it impossible to realise the position of a man who, in the lifetime of his wife, deliberately affiances himself to another woman."

In conclusion I would point out that the decision which I would wish this House to reach in this case would in no way hinder any persons who desire to marry after divorce, from taking that step. It would only compel a person already married to await with decency until he or she is no longer a married man or woman before becoming the subject of a fresh betrothal.

LORD WRIGHT. My Lords, from one aspect the dispute in this case may be regarded as a small matter. Its importance is that it raises a serious and fundamental question of law.

The facts are simple. The appellant, a registered State nurse, became in about January, 1932, the mistress of the respondent, a baronet who was married but not living happily with his wife. In September, 1932, his wife presented a petition for divorce on which in January, 1933, the President pronounced a decree nisi for dissolution of the marriage. This was made absolute on July 31, 1933. Between these dates, on February 21, 1933, and again in April, 1933, the respondent promised to marry the appellant immediately the decree nisi was made absolute. But on June 14, 1933, the respondent by his solicitor stated that the respondent would not marry the appellant. In May, 1934, he married another woman. In the action for breach of promise of marriage which the appellant brought, the promise was not denied nor was the breach. The jury found that the appropriate sum of compensation was 2000*l*. The respondent has,

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however, succeeded in avoiding payment of that sum on the contention that it is against public policy that he should have made the promise he did, and, therefore, that he was not bound in law to fulfil his promise to regularize the position of the appellant, who had been made intervener in the divorce proceedings, or make any reparation to her. Your Lordships are not concerned to consider whether the respondent's conduct is that of an honourable or generous man. The case must be decided simply on grounds of law. The primary duty of a Court of law is to enforce promises which parties have made and to uphold the sanctity of contract which is the basis of society. But in certain cases the Court dispenses parties from keeping their plighted word because of some rule of law founded on what is called public policy. It is said here that there is such a rule of law requiring the Court to say the respondent's promise was not binding, though it is admitted that no precise precedent has established this rule. The rule, therefore, if applied, must be applied as a new rule or at least a substantive extension of a settled rule. So far as I have been able to understand what is advanced as the basis of this particular new rule, it is that it involves the public interest in upholding the marriage state. That there is in general such a public interest I should be the last to deny. But the provisions of English law recognize civil marriage and divorce. Whatever views a judge may personally hold on the public policy of these provisions, he must proceed on the footing that such is the law. The question in the present case is whether after decree nisi there is any public interest in seeking to preserve, at the expense of the solid detriment of sanctioning a breach of contract, the transitory and unsubstantial form of a marriage which by the decree of the Court is practically doomed to extinction in a brief period of months. In the language of the Divorce Court there are innocent and guilty parties. It is said that public policy imposes on both equally a contractual disability of a particular kind after decree that the marriage is to be dissolved until it is finally dissolved. The reasons adduced for this proposition seem to me to be vague and problematical, and not sufficient to weigh against the solid

fact that the parties may legitimately be anxious to stabilize their position against the time when the decree absolute takes effect. The assumed promise is to marry when and if it becomes legally possible to marry, that is, after the decree absolute. The guilty party in such cases may properly be anxious to regularize, as the law permits him to do, his union with his partner in adultery. The innocent party may properly desire now that the Court has declared the practically certain dissolution of the marriage, to lay the foundation of another and happier union. The decree nisi has put an end to the common home, to the consortium vitae, to what are crudely called the conjugal rights. These new relationships are not in their nature bad on the ground of immorality or likely to lead to immorality any more than the engagement of affectionate couples who have not suffered the miseries of an ill-assorted union. On the footing that the marriage of divorced persons is legal in this country, it is true that such a promise may possibly place at least in theory a new obstacle to the parties being reconciled and coming together again. But it is agreed that in the vast number of divorces there is no reconciliation. A mere possibility of that kind cannot to my mind counterbalance the solid and certain considerations which I have indicated. As Lord Truro said in *Egerton v. Brownlow* (1), an authority to which I shall refer later, the judges must be presumed to take care not to apply the law (that is relating to public policy) to doubtful cases. If I thought this type of case was doubtful, that would be enough to justify me in deciding not to invalidate a contract like this. But I go further. There is in my judgment no rule of law such as the respondent claims there is. In any event it is admittedly a new law, or, at lowest, a substantive extension of law. We have high authority for saying that the Court is not to establish new heads of law founded on new public policies. The onus is always on those who assert that the Court is not to enforce a contract which is *ex facie* good, save on grounds of law substantial enough to outweigh the paramount policy of the law that people should keep faith and fulfil

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H. L. (E.) their promises. *Pacta sunt servanda*. As I can find no such grounds in this case, I agree with the convincing judgment of Greer L.J. in the Court of Appeal, and disagree, with all respect, with the judgment of Slessor and Greene L.JJ., who formed the majority.

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The case has been elaborately argued. Many authorities have been cited. Some at least of these authorities and arguments I shall now discuss.

I must first attempt to explain what I think to be the modern law in regard to the duty of the Court concerning rules based on public policy. It is important to realize what is meant by public policy in this connection. In one sense every rule of law, either common law or equity, which has been laid down by the Courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public interest or policy. In that sense Sir George Jessel M.R. referred to the paramount public policy that people should fulfil their contracts. But public policy in the narrower sense means that there are considerations of public interest which require the Courts to depart from their primary function of enforcing contracts, and exceptionally to refuse to enforce them. Public policy in this sense is disabling. It is important to determine first of all on what principles a judge should exercise this peculiar and exceptional jurisdiction when a question of public policy is raised. What is, I think, now clear is that public policy is not a branch of law to be extended, as Lord Blanesburgh, then Younger L.J., said in *In re Wallace* (1). To the same effect Lord Halsbury in *Janson v. Driefontein Consolidated Mines* (2) said: "I deny that any Court can 'invent a new head of public policy.'" Lord Halsbury further denied the right of a judge or a Court to declare that such and such things are in his or their view contrary to public policy. The view of the law which has prevailed is that stated by Parke B. in *Egerton v. Brownlow*. (3) His statement has several times been quoted with approval in this House, by Lord Halsbury in *Janson's* case (4) and Lord Atkinson in *Rodriguez*

(1) [1920] 2 Ch. 274, 303.

(2) [1902] A. C. 484, 491.

(3) 4 H. L. C. 1, 123.

(4) [1902] A. C. 496.

v. *Speyer Brothers* (1); and in the Court of Appeal by Lord Reading, delivering the judgment of the full Court, in *Continental Tyre and Rubber Co. (Great Britain) v. Daimler Co.* (2) The statement runs thus: "It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise." Similarly Lord Lindley said in *Janson's case* (3): "public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson B. and Parke B. in *Egerton v. Brownlow*." (4) No doubt Lord Lindley had in mind (inter alia) the words quoted from Alderson B. by Lord Sumner in *Speyer's case* (5): "My duty is as a judge to be governed by fixed rules and settled precedents." This, I think, explains what Lord Lindley means by "made safe by decision." Public policy, like any other branch of the common law, is governed by the judicial use of precedents. To the same effect in the *Mogul* case (6) Lord Bramwell quotes the words of Cave J. in *In re Mirams* (7): "Certain kinds of contracts have been held void at Common Law on this ground" [of public policy]; "a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as

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(1) [1919] A. C. 59, 91.

(5) [1919] A. C. 59, 126.

(2) [1915] 1 K. B. 893, 912.

(6) [1892] A. C. 25, 45.

(3) [1902] A. C. 507.

(7) [1891] 1 Q. B. 595.

(4) 4 H. L. C. 1, 123.

H. L. (E.) “expounders of what is called public policy.” That this is a modern rule is, I think, clear from considering the method in which Courts have considered such questions when they have arisen in modern times, as, for instance, in the *Mogul* case (1), the *Maxim Nordenfelt* case (2); *Rodriguez v. Speyer Brothers*. (3) They have proceeded to apply some recognized principle to the new conditions, proceeding by way of analogy and according to logic and convenience, just as Courts deal with any other rule of the common law. Thus they have sometimes applied the principle to new conditions, as the majority of this House did in *Speyer’s* case (3), and sometimes refused to extend the principle, as this House did in *Janson’s* case (4) or the Court of Appeal did in *Wallace’s* case (5) or, to take a more famous instance, as was done in the *Thellusson Will Case* (6), when the rule against perpetuities was not extended.

I may here refer to the brief but illuminating statement of Lord Cranworth in *Egerton v. Brownlow* (7) on this matter. It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world: but that is true of the principles of common law generally. I find it difficult to conceive that in these days any new head of public policy could be discovered.

I have found it necessary to state my opinion on this matter because it has been at least suggested, if not overtly argued, that a judge has peculiar powers in a question of public policy in acting upon his individual views or predilection and can on these grounds refuse to enforce a contract or disposition of property *ex facie valid*. That was the view expressed, in sharp contrast to the views of Parke B. and Alderson B. which I have quoted, by Pollock C.B. in the same case of *Egerton v. Brownlow*. (8) He said: “It may be “that judges are no better able to discern what is for the “public good than other experienced and enlightened members “of the community; but that is no reason for their refusing

(1) [1892] A. C. 25, 45.

(2) [1894] A. C. 535.

(3) [1919] A. C. 59, 91.

(4) [1902] A. C. 484, 496.

(5) [1920] 2 Ch. 274.

(6) (1799) 4 Ves. 227.

(7) 4 H. L. C. 1, 253.

(8) 4 H. L. C. 151.

"to entertain the question and declining to decide upon it." While it is true that a judge is entitled to have and even state on proper occasions his personal opinions on questions of public interest, it is a different matter if he claims to base his judicial decisions on his personal opinions. Hence the modern acceptance of the contrasted view of Parke B. which I have explained. Pollock C.B., it seems, approves of the reasoning adopted in *Gilbert v. Sykes* (1) and of the unfair and illogical rule, long abolished by Parliament, that seamen were not entitled to insure their wages. *Gilbert v. Sykes* (1) was one of the cases in which the Court invented the most extraordinary views of public policy to avoid enforcing wagers. The curious who read it will find it a good specimen of a judicial practice in these matters current in the early decades of the nineteenth century but long since obsolete. Parke B. in *Egerton v. Brownlow* (2) said of these cases that "Courts have . . . been astute, even to an extent bordering on the "ridiculous, to find reasons for refusing to enforce them." He goes on to discuss the idea that the supposed tendency to evil constitutes a ground for avoiding transactions, and points out what consequences would follow from its logical application, for instance, insurances on life or against fire might be declared void as tending to murder, suicide or arson. He adds "in short there are few contracts in which a suspicious "mind might not find a tendency to produce evil; and to "hold all such contracts to be void would indeed be an intolerable evil." It is true that the majority of the House in *Egerton v. Brownlow* (3) came to the conclusion advised by Pollock C.B. and not that advised by Parke B. and the eight judges who agreed with him, but there was no need for such extreme reasoning to support their judgment, which indeed was a legitimate extension of *Kingston v. Pierepont* (4), and depended on the view that the condition in question was aimed at and tended to exercise a corrupt influence on the Government in regard to the appointment to high dignity in the State, that is, a dukedom or marquiseate. Later the

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(1) (1812) 16 East. 150.

(2) 4 H. L. C. 1, 124.

(3) 4 H. L. C. 1, 151.

(4) (1681) 1 Vern. 5.

H. L. (E.) Court of Appeal in *In re Wallace* (1) refused to extend this doctrine to a baronetcy. The only place in which I have found Pollock C.B.'s dictum quoted is in *Speyer's* case (2) by Lord Haldane, but only with very qualified approval. It was not necessary for the decision and finds no reflection in the opinions of his colleagues, either the two who agreed with him or the two who dissented. In view of the passages I have quoted from later judges, it is, I think, clear that this dictum of Pollock C.B. and certain observations in *Egerton v. Brownlow* (3) to a similar effect cannot be regarded as fixing the modern law, which in my opinion is as stated by Parke B.

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This necessarily brief analysis of the law, as I understand it, enables me to propose the question to be decided in this appeal—namely, is there any rule of law founded on public policy which could justify avoiding the promise sued upon. Or, to paraphrase the words of Lord Halsbury in *Janson's* case (4), what are the definite propositions as to what interest of the State or what public injury is supposed to be involved or how or on what principle of law the promise was unlawful. The matter must be decided on tangible grounds, not on mere generalizations.

The law will not enforce an immoral promise, such as a promise between a man and woman to live together without being married or to pay a sum of money or to give some other consideration in return for immoral association. But nothing of the sort was suggested in this case. On the contrary, the promise, if carried out, would have regularized an immoral association. English law recognizes the right of divorced people to marry though their former consorts are alive. The law has furthermore sacrificed a rigid idea of morality to the idea of making reparation by enforcing obligations under seal by a man to pay money to a woman in respect of past immoral cohabitation, though it might have been said that to enforce such obligations tended to encourage immorality. The only public policy which can be involved

(1) [1920] 2 Ch. 274.

(2) [1919] A. C. 59, 78.

(3) 4 H. L. C. I, 151.

(4) [1902] A. C. 484, 490.

in this case must be that of promoting and safeguarding as far as may be the relationship of marriage, the maintenance of which must always be regarded as of primary moment in any civilized State and not least in a country like ours, which is essentially monogamous. The marriage relationship is certainly a matter of public interest; it involves a status of public character, indissoluble by the consent of the parties, though by English law dissoluble since the Reformation by the legal machinery provided by Parliament. As, unfortunately, there are unhappy and ill-adjusted marriages, the law has provided carefully guarded and restricted means of ending them; before 1857 by the divorce *a mensa et thoro* followed by a private Act of Parliament; since 1857 by the Matrimonial Causes Act and its amending Acts. Apart altogether from questions of divorce, questions arose about the validity of separation agreements. It was held at first that an agreement for the separation of husband and wife and their living apart was illegal, as in *Mortimer v. Mortimer*. (1) The agreement was held to involve a renunciation and dereliction of the mutual offices which the parties were not at liberty to desert. Lord Eldon was originally of that opinion, but later recognized the validity of separation agreements, and in *Wilson v. Wilson* (2) this House finally decided that agreements for immediate separation or made where there was actual present separation were legal and valid, and that dispositions of property under them would be specifically enforced. Later, in *Hunt v. Hunt* (3), in 1861, the Lord Chancellor granted an injunction against a spouse suing another for restitution of conjugal rights where there was a separation agreement. Lord Westbury said that the law regarded a deed of separation as any other legal contract, and that voluntary separation was not an offence at common law, however it might be regarded from a religious point of view. He said that it was not contrary to any policy of the law, which he defined as a consideration of such general and universal public utility as should as a matter of sound reason

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(1) 2 Hagg. Consist. Rep. 310.

(3) 4 De G. F. & J. 221.

(2) 1 H. L. C. 538.

H. L. (E.) regulate the proceedings of Courts of justice. It was true, he said, that the Ecclesiastical Courts would not admit a separation agreement as a bar to a suit for restitution of conjugal rights; but, as he pointed out, the statute of Henry VIII. provides that ecclesiastical law is only to prevail so far as not contrary to the common law, and as this law does recognize separation agreements as legal, a Court of equity would enforce them by injunction.

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It is clear that to admit the legality of such agreements was to legalize the cessation by mutual agreement of the consortium vitae of matrimony, to prejudice the chances of reconciliation and perhaps to sacrifice the interests of the children. What, however, was not enforced was a contract before marriage or before the spouses actually separated or agreed to separate, which provided for the position if in future they did separate. It was held that an agreement for future separation was against the policy of the law. The distinction between that and the cases of actual separation is obvious. If a separation has actually occurred or become inevitable, the law allows the matter to be dealt with according to realities and not according to a fiction. But the law will not permit an agreement which contemplates the future possibility of so undesirable a state of affairs. But the law admitted a still further, though not inconsistent, refinement. Where parties had separated but were coming together again, their agreement for resuming cohabitation may, it has been held, contain a provision for maintenance if they separate again: *Macmahon v. Macmahon*. (1) I have referred to these cases as illustrating the modern development of a rule of public policy in relation to the marriage state, apart from the Matrimonial Causes Act. I think it very significant as supporting the distinction which I draw between the position before and after decree nisi.

The Act of 1857 provided for a single decree of dissolution, leaving the parties free to marry again, as soon as appeals were out of question. By the amending Acts of 1860 and 1866, the decree of dissolution was changed from being a single decree into a bipartite decree. The position was peculiar,

(1) [1913] 1 I. R. 428.

because the decree nisi was an adjudication that the matrimonial offences justifying divorce were established, and that the marriage was to be dissolved; but the decree was only to be absolute if within six months sufficient cause were not shown why it should not be made absolute. It has been said that the decree nisi constitutes the inchoate, the decree absolute the final dissolution. Between the decrees, the marriage, not being, but only to be, dissolved, still subsists. If one party dies before decree absolute, the survivor will be widow or widower as the case may be. Adultery in that period will be a matrimonial offence, which if committed by the petitioner, will be a ground for rescinding the decree, or if committed by the respondent would found, if need be, a new petition. In that period the woman in former days was still under the contractual disabilities of a married woman: *Norman v. Villars* (1), though a Court of equity would treat the decree absolute when pronounced as relating back to the decree nisi so as to relieve the woman against acts of the husband prejudicing her estate: *Prole v. Soady*. (2) The order nisi in truth determines the status of the parties though its final operation is suspended and it is subject to a contingency. Sect. 7 of the Act of 1860, which introduced the bipartite decree, shows that the purpose of the interval was not the private interest or detriment of the parties, but to enable the King's Proctor or other member of the public to show cause, if need be, why the decree should not be made absolute because the decree nisi had been obtained "by collusion or by reason of material facts not brought before the Court." One consequence, not perhaps contemplated, has been if a petitioner does not apply to have the decree made absolute, the respondent cannot apply, and hence the final decree may never be made. This unmeritorious course is rarely adopted. In the very few cases in which it is adopted, it is mostly for the purpose of exacting better terms. But in the vast majority of cases, the decree absolute follows the decree nisi in due course; indeed the Court has a discretion to make the decree absolute at any time within the stipulated six months.

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(1) 2 Ex. D. 359.

(2) L. R. 3 Ch. 220.

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The marriage then in the sense and respects which I have indicated continues until decree absolute. But it is obvious that in truth and in substance there is no longer any marriage. There is no longer any matrimonial home, no consortium vitae, no right on either side to conjugal rights. The Court has at the suit of the petitioner publicly found the respondent guilty of matrimonial offences which in law go to the root of the relation, there is no common home for the children, if there are children, and the Court has to provide for their position. The Court has pronounced for dissolution to take place, subject to the qualification I have stated, at the end of a specific fixed and brief period. If realities are to be looked at and not mere form, by the Court, as the Court did in regard to judicial separation, the marriage is at an end, and the parties are entitled to provide for their future, at the end of the period fixed for the decree absolute, when by English law they are entitled to marry again. How can the public interest in regard to marriage be prejudiced if the innocent petitioner then desires to enter into an engagement, conditional on the decree absolute, for a fresh marriage? The law permits such a marriage and indeed in general it would be regarded as in the public interest. Again, how can the public interest be prejudiced if the respondent seeks to make a conditional engagement to terminate or atone for an immoral association with the intervener or co-respondent? In this case also public policy would seem to favour such a course. Or the guilty party may not desire to renew the immoral association, and may desire to form a new engagement and lay the foundation of a new life. Why should the law impose on these people a contractual disability, even though temporary, merely because they have contracted an unfortunate marriage and availed themselves of, or become subject to, the divorce law? There is, in my judgment, no authority for any such rule of law or any such new public policy. Public policy is, in my judgment, best subserved by the opposite view.

It is, however, contended that the case is governed by the decision in the Court of Appeal in *Wilson v. Carnley* (1) agreeing

(1) [1908] 1 K. B. 729.

with a decision of Phillimore J. in *Spiers v. Hunt*. (1) These were cases in which the promise to marry was given while the marriage state in the full legal sense continued, and before decree nisi had been made or even sought. But it was said that as the marriage is not dissolved till decree absolute, the fact of decree nisi makes no difference. I cannot see how a question of public policy can be decided on what appears to me to be a technicality. Even if *Wilson v. Carnley* (2) be correctly decided, still I find in the decree nisi a ground of distinction as decisive as the distinction between the dukedom or marquise and the baronetcy which distinguished *In re Wallace* (3) from *Egerton v. Brownlow* (4); or between *Thellusson's Case* (5) and those in which the rule of perpetuities was applied; or between *Janson's case* (6) and *Speyer's case* (7), and the earlier cases respectively in which a contrary view was taken of the applicability or non-applicability of the public policy in regard to alien enemies. The approach to the question is the same, in my opinion, in a question of law based on public policy, as in any other case in common law or equity, where a previous authority has to be either extended or distinguished. As Lord Lyndhurst said in *Egerton v. Brownlow* (8): "Each case" (meaning, as I think, each class of cases) "must be determined according to its own circumstances." He instances a typical equity case, that of a trustee dealing with his cestui que trust. I must accordingly consider whether the ratio decidendi of *Wilson v. Carnley* (2) is appropriate to govern this case or whether it does not point to the opposite conclusion in this case.

I shall assume for purposes of this appeal (as has been assumed in argument) that *Wilson v. Carnley* (2) was rightly decided. That exact question has not been argued before your Lordships. When *Wilson v. Carnley* (2) came before Channell J. (9) on the abstract question of law whether the promise given during marriage was void, that admirable common lawyer said he could not decide it as an abstract question, instancing

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(1) [1908] 1 K. B. 720.

(2) [1908] 1 K. B. 729.

(3) [1920] 2 Ch. 274.

(4) 4 H. L. C. 1.

(5) 4 Ves. 227.

(6) [1902] A. C. 484.

(7) [1919] A. C. 59, 91.

(8) 4 H. L. C. 1, 161.

(9) (1907) 23 Times L. R. 578.

H. L. (E.) such cases as where the other consort was an incurable lunatic, or the promise was made at the instance of a dying consort. ¹⁹³⁷ Phillimore J., in *Spiers v. Hunt* (1) said he did not decide such cases: the rule might be general but not universal. Again, ^{v.} in *Wild v. Harris* (2) and in *Millward v. Littlewood* (3) the Court of Common Pleas and the Court of Exchequer respectively did not hold a promise to marry by a person already married as bad in law. It is curious that Pollock C.B. and Parke B. appear to have taken different views on this question of public policy. Both these cases presented complications, and might, it seems, have been decided on other grounds than the mere promise in favour of the plaintiffs. The Court of Appeal in *Wilson v. Carnley* (4) were prepared if necessary to overrule these authorities. In that case the plaintiff and defendant both thought the wife was likely to die soon. So far as I can follow the precise reasons given why the contract was void ab initio as being against public policy, they were primarily that the contract was likely to induce a breach of morality and likely to conduce either to the crime of murdering the spouse or perhaps the attempt to procure a dissolution of the marriage by conduct on the part of the husband which would compel the wife to seek divorce. It was also said that such a promise was inconsistent with that affection which should subsist between married persons. I agree that it is difficult to imagine from the standpoint of an affectionate and happy marriage, or, indeed, any marriage where the parties were living together how a man or a woman could in the consort's lifetime enter into an engagement to marry another. As I have said, I am prepared to assume without finally deciding that *Wilson v. Carnley* (4) is rightly decided. But I do not see why it should be said that such a promise as that in question would conduce to immorality or have such a tendency to conduce to immorality that the Court would hold it void on that ground. On a matter of this nature, there neither is nor can be evidence on which the judge can act. The question is a question of law, and the judge must, if necessary, act upon general considerations of human nature.

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(1) [1908] 1 K. B. 725.

(2) 7 C. B. 999.

(3) 5 Ex. 775.

(4) [1908] 1 K. B. 729.

Some judges may feel that undue suspicions or pruriency are to be avoided. I am not sure how considerations of that sort apply in such a case, unless it is conceived that an act of such disloyalty shows such a wicked mind that anything may be expected. But I have not considered it necessary to form any final opinion on *Wilson v. Carnley* (1) which may well be correctly decided on the ground of disloyalty, because I think that quite different considerations apply in a case where the marriage has been contingently dissolved by a decree nisi on petition. The marriage bond is then for all practical purposes severed; indeed the marriage is in truth dissolved. Loyalty is in fact at an end. Of course if the promise is given in consideration of future immoral relations it is illegal and void on that ground, but I cannot see any implied general tendency to immorality in such a promise. If the guilty parties are living together in immoral relations, the promise points to moral relations being established by marriage in the near future, when the decree is made absolute. If the parties are acting morally, I cannot see why the promise after decree nisi should lead them into immorality. There is the further reason which distinguishes from a case like *Wilson v. Carnley* (1) the case of an engagement entered into after decree nisi: in that latter case the period of delay is fixed by law with what is practical certainty (because I disregard the very exceptional and practically negligible cases where the petitioner refuses to apply for decree absolute or where the decree nisi is rescinded) and there is no real temptation to anticipate the consummation of the union or to accelerate the period when it will be possible legally, and there is no need to adopt improper means to procure the dissolution of the tie because the marriage is already dissolved in truth by adjudication of the Court. All that can be done in that respect is already accomplished. Again, there can be no motive of affection or loyalty after decree nisi which would be outraged by either the innocent or guilty party entering into the new engagement, conditional on decree absolute. Kennedy L.J. in *Wilson v. Carnley* (2) refers to the cases "in which separation deeds have been held good" as "really

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(1) [1908] 1 K. B. 729.

(2) [1908] 1 K. B. 743.



H. L. (E.) “cases in which, circumstances having brought the parties to the
 1937 “point at which separation was inevitable, it was merely a ques-
 FENDER “tion of making provision for the terms of such a separation.”
 v. I cannot conceive any such case in which separation is as
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 MILD MAY. and I do not see why either party or both parties independently
 Lord Wright. should be debarred from making provision for the future when
 the final and inevitable separation has taken place.

Certain cases in the Courts of the United States have been referred to, but the reasoning of these cases seems equally inappropriate to such a case as the present, and indeed to support the view I have formed. In *Paddock v. Robinson* (1) the promise was given while both parties were married. It was said the promise involved a moral unfaithfulness to the marriage tie and was incapable of performance except on a contingency so remote as not to be expected and a sin to anticipate it. In *Noice v. Brown* (2) a married man, living apart from his wife who was prosecuting a suit for divorce, promised to marry the plaintiff within a reasonable time of divorce. There again there had been no adjudication by the Court and no inchoate decree like the decree nisi for dissolution.

But I have not found in any of these cases reference to a matter which seemed to me most worthy of consideration when I was deliberating on this case, I mean the point that such a promise as that in question may tend to present an obstacle to reconciliation. The law would undoubtedly favour reconciliation if there were any prospect of it, especially where there are children of the marriage. In a sense the interests of children are sacrificed in divorce, though it may be that in the unfortunate circumstances the separation of the parents is best even for them. But it is clear that the validity of a separation agreement is an obstacle to reconciliation and reduces the prospect of it, yet that has not been held to make such agreements contrary to public policy. I think the real answer to the difficulty is that the prospect of reconciliation is too remote. It is admitted on both sides that in the vast number of cases the

(1) 14 Amer. Rep. 112.

(2) 20 Amer. Rep. 388; 23
 Amer. Rep. 213.

decree nisi is followed by the decree absolute, and I think the chance of reconciliation is too slight to furnish a sufficient reason to hold the promise of marriage void. It is true that a tendency to a certain result may constitute a matter contrary to public policy: but as I pointed out above, it must be a substantial or serious tendency sufficient to justify so grave a conclusion. A promise such as the present but made after decree absolute would be an obstacle to reconciliation, but no one would treat that as a ground for saying promises after decree absolute are against public policy. A mere remote possibility cannot be weighed against the solid fact of a contract *ex facie* legal and binding.

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In all the cases, many hundreds in number, in which sitting as a judge of assize I made orders nisi I never heard of one in which the decree nisi was not made absolute. I cannot recall a single case in which there appeared to me to be the slightest prospect of reconciliation. It seemed clear that a chapter was being closed and a new chapter being opened. In most cases it seemed obvious that the petitioner was looking forward to commencing a new life.

I have here chosen the decree nisi as marking the line of division and demarcation. Many of the above arguments would apply to a mere separation and even more to the presentment of a petition. But I think a decisive point is reached by the decree nisi. The petition is merely the first step in proceedings. The result is uncertain. There is no public hearing. It is true the parties are, when the petition is lodged, almost certainly living apart and must live apart while the petition is pending. But there is nothing final such as there is in the adjudication and the decree nisi, given in public Court and in the eyes of the world. Before that the charges may fail, the petition may be compromised, the parties may be reconciled. The whole position, in my opinion, becomes changed and fixed by the decree nisi.

On the whole case, I think the appeal should be allowed.

LORD ROCHE. My Lords, it is a settled rule of the law of England that certain classes of contracts, which by reason of their nature and tendency are contrary to public policy,

H. L. (E.) will not be enforced in our Courts: *Egerton v. Brownlow*. (1)
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 v. brokerage, contracts in restraint of trade, contracts tending to
 ST. JOHN assist the King's enemies: see per Lord Halsbury L.C. in
 MILD MAY. *Janson v. Driefontein Consolidated Mines*. (2)

Lord Roche.

In my opinion it may also be regarded as a settled rule of our law that, in general, promises of marriage made where one of the parties to the knowledge of the other party is married at the time of the promise fall into and constitute a class of contract which is unenforceable as contrary to public policy. This, in my opinion, is the effect of the decision of the Court of Appeal in *Wilson v. Carnley* (3), approving *Spiers v. Hunt* (4), and although the matter has not been previously considered in this House it has come before the Judicial Committee of the Privy Council in *Skipph v. Kelly*. (5) The law was thus stated in the judgment of the Board delivered by Lord Dunedin: "It was undoubtedly the case that the defendant first proposed "marriage when Mrs. Kelly (the plaintiff) was a married woman. "It was understood between them that a divorce was pending, "and a divorce afterwards took place, but it had been quite "settled in law that a promise made in these circumstances was a "void promise." The same settled rule of law prevails in the Courts of the United States of America—and is thus stated by Professor Williston in his work on Contract, 1926 ed., s. 1743: "An agreement by a married man to marry another woman "after a divorce not as yet granted from his present wife is "illegal." In the reported cases, English and American, various illustrations of the evil tendencies of such agreements are given, but the essence is that "they are, in themselves, a "violation of marital duty": Lawrence C.J. in *Paddock v. Robinson*. (6) I confess it seems to me manifest that it is incompatible with the status of marriage that a spouse should also be the betrothed of another. There are cases in the books where a promisee has recovered damages where a promise has been made by a spouse concealing from, or not disclosing to,

(1) 4 H. L. C. 1.

(2) [1902] A. C. 484, 491.

(3) [1908] 1 K. B. 729.

(4) [1908] 1 K. B. 720.

(5) (1926) 42 Times L. R. 258.

(6) 14 Amer. Rep. 112, 113.

the promisee the fact of a subsisting marriage. Such decisions may be supportable on the grounds of a collateral warranty or of fraud and do not affect the validity of the rule. It was conceded at the Bar by the appellant's counsel that the general rule subsisted and it was not sought to question it in argument before your Lordships. The argument for the appellant was shortly and solely this, that although certain promises of marriage which were made in the present case before the decree nisi (dated January 16, 1933) were not enforceable and were not relied upon, promises made after decree nisi and before decree absolute were not within the rule and were enforceable. It was said that the basis of the rule was the preservation of loyalty between spouses and that upon the decree nisi loyalty was so impaired or destroyed that the rule could not and did not operate.

I find myself quite unable, with the greatest respect to those of your Lordships who think otherwise, to assent to this reasoning. The decree nisi operates only in the future and when the Court sees fit to make it absolute, and I need not repeat what has been truly said by my noble and learned friend Lord Russell of Killowen as to the continued subsistence of the married status of the parties to the marriage after a decree nisi and as to the bearing of that fact upon questions of adultery and of reconciliation. The plain fact, as it presents itself to my mind, is that after decree nisi the respondent was a married man as he was before and was in no material respect in a different situation from that he was in after he committed matrimonial offences by entering on an adulterous intercourse with the appellant, who knew he was married, or from that he was in after his wife petitioned for divorce and cited the appellant as a party to the suit. It seems to me to be inadmissible and contrary to the established rule of law to deal in degrees of marriage and to draw a line at either the filing of a petition or at the pronouncement of a decree nisi and to say that at either of those dates a party is so little married that the rule as to promises of future marriage does not apply. I also regard it as impermissible in law to enter upon an examination of particular circumstances in this manner. The opinions expressed in this House in *Janson v. Driefontein Consolidated*

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H. L. (E.) *Mines* (1) are much in point. In that case the defendant
 1937 Janson, a British underwriter, contended that the seizure of
 FENDER gold, the property of the plaintiff company, a foreign subject,
 v. by his own government in the Transvaal Republic before the
 St. JOHN- outbreak of the Boer War, and, as it was said, in preparation for
 MILDMAY. such war, fell within the rule by which no recovery could be had
 Lord Roche. for such a seizure if made by an enemy. This House would
 not so extend the rule. Lord Halsbury, having stated in the
 terms I have already mentioned the rule of law as to contracts
 contrary to public policy, said that the rule "does not leave
 "at large to each tribunal to find that a particular contract is
 "against public policy," and that, the rule being a rule as to exist-
 ing war, imminent war is not the same as war, and expected wars
 do not make a contract illegal. Lord Macnaghten said that the law
 "knows nothing of an intermediate state which is neither one
 "thing nor the other—neither peace nor war." Lord Lindley
 said: "A contract or other transaction which is against
 "public policy, i.e., the general interest of this country, is
 "illegal; but public policy is a very unstable and dangerous
 "foundation on which to build *until made safe by decision.*"

I have ventured to emphasize the last words of Lord Lindley's sentence by italics because they are omitted in the headnote to the case, which is therefore apt to mislead. The decision is plainly not in derogation of the rule as to public policy. It is an affirmation of its existence and force accompanied by a refusal to innovate, in that case by adding something to a rule sanctioned by decision. Here in my opinion this House is again asked to allow an innovation by taking something away from a rule sanctioned by decision. It is also asked in my opinion to act as this House refused to act in *Janson's* case (2) to know some intermediate state which is neither one thing nor the other, neither marriage nor divorce, and to treat expected or imminent divorce as the same as divorce. I find myself unable to regard such a derogation from the rule as permissible in law. Now to evolve new heads of public policy or to subtract from existing and recognized heads of public policy if permissible to the Courts at all, which is debatable,

(1) [1902] A. C. 484, 491, 497.

(2) [1902] A. C. 484.

would in my judgment certainly only be permissible upon some occasion as to which the legislature was for some reason unable to speak and where there was substantial agreement within the judiciary and where circumstances had fundamentally changed. None of those conditions seems to me to exist here. As to the last matter, change of conditions : it was suggested in argument for the appellant that such a change had taken place in the accepted views as to marriage and divorce. I confess I find no change relevant to the matter now in question. Merely in order that I may not be misunderstood it may be permissible to say that I am not venturing on any disapproval of the Act of 1857 nor of subsequent modifications of it nor of proposals for its further modification which in my judgment deserve full and sympathetic consideration. But as to the essentials of the status of marriage whilst it subsists and as to the importance of it as an institution I think that the language of Kennedy L.J. is as true to-day as when it was used in 1908. In the course of his judgment in *Wilson v. Carnley* (1) he said : " I do not think that in post-Reformation times any change "of view material for the present purpose has taken place with "regard to the moral obligations involved by marriage. Apart "from the especial sanctity which from an ecclesiastical point "of view was formerly attached to marriage, and although the "idea of its sacramental character, which once formed the basis "of the civil law of Europe with regard to it, no longer prevails "among the majority of persons in this country, I think that "nothing has really ever been allowed to derogate from the sense "of the obligations involved in the status of marriage."

I have but few other observations to make upon the particular case under discussion. It was said in argument for the appellant, that little of the substance of marriage was left after a decree nisi ; but of what remains whilst the marriage is undissolved not an insignificant part is the duty the spouses, the parties to the suit, owe to the Court in charge of the divorce proceedings, including the supreme duty of candour and good faith. I cannot myself regard it as tending to the performance of such duty that whilst the Court is still suspending its final

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(1) [1908] 1 K. B. 729, 743.

H. L. (E.) decree and may not pronounce it at all, another and powerful motive for securing its pronouncement should be interposed by the act of one of the parties. There would indeed, as it seems to me, be some inconsistency in another Court holding to be enforceable a promise of another marriage on an event which the Court in charge of the divorce suit relating to the subsisting marriage has yet to determine.

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It was also argued that the matter must not be considered or decided on the facts of this case and that it should be supposed that the promise of marriage was made by an innocent petitioner. I confess for myself that taking I hope a not unduly unfavourable view of human nature I could not but think that innocent petitioners would be averse to either making or disclosing to the Court binding promises to contract a new marriage pending a final decree dissolving the subsisting marriage. Whilst therefore the facts of this somewhat sordid case are not conclusive of the tendency of promises such as these, I think with Greene L.J. that they afford an illustration of the real and general tendency of such promises.

I would also desire to adopt without reiteration that which was said by Greene L.J. as to the essential difference between the functions of a divorce judge in the exercise of his discretion where he is charged with the examination of particular cases and the functions of a Court charged with the application of a general and established rule of law such as is now in question. Public policy, it is true, has been said to be an unruly horse ; but no one denies that it is given to the Courts to manage. Metaphors and analogies are often misleading, but this one can serve a useful purpose if it is a reminder that the management that is most useful is one that is most consistent and uncapricious. It is because I feel satisfied that to make the exception contended for by the appellant would not be a compliance with the rule or with these conditions for its administration that I am in favour of the dismissal of this appeal.

Appeal allowed.

Solicitors for appellant : *Percy Haseldine & Co.*

Solicitors for respondent : *Sutton, Ommanney & Oliver.*

[HOUSE OF LORDS.]

WILSONS & CLYDE COAL COMPANY,	}	APPELLANTS ;	H. L. (Sc.)*
LIMITED			
AND			
ENGLISH		RESPONDENT.	1937 May 25, 27, 28, 31 ; July 19.

Master and servant—Accident to servant—Defective system of working in mine—Delegation by master to agent—Liability of master—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 2.

The provision of a safe system of working in a mine is an obligation of the owner, who, if he appoints an agent to perform it, remains vicariously responsible for the agent's negligence. ✓

An agent in performing the owner's duty of providing a safe system of working in the mine is not engaged in common employment with an ordinary workman in the mine ; he is performing the duty of the owner, not the duty of an employee, and consequently the defence of common employment is not available to the mine owner, where injury has been caused to a workman through the negligence of the agent.

Decision of the Court of Session 1936 S. C. 883 affirmed.

Dicta in *Fanton v. Denville* [1932] 2 K. B. 309 held to be contrary to decisions of the House of Lords.

APPEAL from the Court of Session. (1)

The respondent was employed by the appellants, who owned a number of collieries, as an oncost worker at their Glenraig Colliery, and while so employed on March 27, 1933, he sustained injuries in respect of which he claimed damages at common law from the appellants.

On the date mentioned the respondent was employed underground in repairing an airway leading off the Mine Jigger Brae, one of the main haulage roads, and while he was proceeding, at the end of the day shift, between 1.30 and 2 P.M., to the pit bottom by way of the Mine Jigger Brae, the haulage plant was put in motion and, before he could reach one of the manholes provided, he was caught by a rake of hutches and crushed between it and the side of the road.

The respondent's case was that the time fixed by the

(1) 1936 S. C. 883.

* *Present* : LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

H. L. (Sc.) appellants for raising the day shift men up the pit was between 1.30 and 2 P.M., and that it was a necessary part of a safe system of working that the haulage should be stopped on the main haulage roads during this period, and that this was in accordance with usual and recognized mining practice in Scotland.

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The appellants denied this averment, and stated that there was an alternative road open for the respondent's return to the pit bottom, and that, in any event, he should have informed the man in charge of the haulage machinery, who was within easy call, of his emergence into the Mine Jigger Brae, and should not have proceeded along the Brae until he had ascertained that the haulage had stopped for the shift, or arranged that he could safely proceed. They pleaded contributory negligence on the respondent's part.

By s. 2, sub-s. 4, of the Coal Mines Act, 1911: "The owner or agent of a mine required to be under the control of a manager shall not take any part in the technical management of the mine unless he is qualified to be a manager."

At the trial certain questions were left to the jury which, with their answers, were as follows:—

1. Was a reasonably safe system of working provided for the men on the day shift in the Butter's section of the Glenraig Colliery returning to the pit bottom at the end of the shift?—No.

2. Did (1.) the defenders' board of directors or (2.) the agent know of the said system of working in operation in the said section?—(1.) No. (2.) Yes.

3. Did (1.) the defenders' board of directors or (2.) the agent know of any defect in the said system?—(1.) No. (2.) Yes.

4. Was the provision of the said system of working part of the technical management of the colliery?—Yes.

5. Was the accident to the pursuer caused by failure to provide a reasonably safe system of working in the said section?—Yes.

6. Did the pursuer fail to take reasonable care for his own safety?—No.

7. If so, did he cause or materially contribute to the accident?—No. H. L. (Sc.)

8. Was the pursuer in breach of (1.) s. 43, sub-s. 1, or (2.) s. 74 of the Coal Mines Act, 1911?—(1.) No. (2.) No.

9. On the assumption that the pursuer is entitled to damages, at what figure do you assess the damages?—500*l*.

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Upon these findings judgment was entered for the respondent, and on appeal the Second Division, with the addition of the Lord President, Lord Morison and Lord Fleming of the First Division, by a majority, refused the appellants' motion for review and adhered to the interlocutor of the Lord Ordinary. The appellants appealed to this House.

Erskine Hill (of the English Bar and K.C. of the Scots Bar) and *C. D. L. Murray* (of the Scots Bar) for the appellants. The question is whether a master who has delegated the management of his mine to a competent agent is responsible for a defect in the system due to the negligence of that agent. In those circumstances it cannot be said that the master has undertaken to do something which he has deliberately delegated to the agent, and which, indeed, he is bound under the Coal Mines Act, 1911, to delegate if he has not the requisite qualifications himself. The common law duty of a master towards his servant is to take care not by his personal negligence to allow him to suffer injury; but, if the master delegates the duty of management to a competent and qualified subordinate, the master's responsibility in respect of his common law duty ceases, unless, of course, it is shown that he had knowledge of the defect and that he did nothing to remedy it. The owner of a mine does not undertake to the miners that he will personally supervise the working, and what more can he do than obtain the services of a skilled person to supervise the working? The judgments in the Court of Session in this case have altered the test from what the master has undertaken to do to what it must be assumed he ought to do, and while they have accepted the concept of no absolute duty, they are in fact demanding from the master a warranty against negligent supervision on the part of the

H. L. (Sc.) agent to whom the duty has been delegated. In *Fanton v. Denville* (1) the Court of Appeal held that the employer's obligation towards his servants is to appoint a competent agent as his delegate and to supply him with the requisite financial means necessary for the work. These conditions were satisfied in the present case. There was no evidence given to show that in other mines there was a complete stoppage of haulage work between 1.30 and 2 P.M. *Wigmore v. Jay* (2) supports the view we contend for—namely, that the master is not liable for any failure by the agent to whom supervision has been delegated. In *Bartonshill Coal Co. v. Reid* (3), Lord Cranworth distinguished between an employer's liability towards third parties and his liability towards his servants. As to the latter he said that at common law a servant takes the risk of want of care on the part of a fellow-servant, and for this the employer cannot be made liable: see also *Bartonshill Coal Co. v. McGuire* (4); *Cribb v. Kynoch* (5); and *Young v. Hoffmann Manufacturing Co.* (6) In *Sword v. Cameron* (7) it was held that the operation of blasting a rock having been conducted without due precautions being taken by one of the servants of the lessees of the quarry, the latter were liable to another of their servants for the injuries caused to him thereby, but in that case there was no question as there is here of a delegation of duty to a competent agent; neither was there in *Paterson v. Wallace & Co.* (8) In *Weems v. Mathieson* (9) Lord Cranworth said that all that the master is bound to do is to provide machinery fit and proper for the work and to have it superintended by himself or his agent. Again, in *Wilson v. Merry & Cunningham* (10) it was said that what the master is bound to do in the event of his not personally superintending and directing the work is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. That was the principle accepted and acted on

(1) [1932] 2 K. B. 309.

(2) (1850) 5 Ex. 354.

(3) (1858) 3 Macq. 266.

(4) (1858) 3 Macq. 300.

(5) [1907] 2 K. B. 548.

(6) [1907] 2 K. B. 646.

(7) (1839) 1 D. 493.

(8) (1854) 1 Macq. 748.

(9) (1861) 4 Macq. 215.

(10) (1868) L. R. 1 H. L. (Sc.) 326.

in *Fanton v. Denville* (1) and which we contend should be applied in the present case. H. L. (Sc.)

[LORD ATKIN. In *Paterson v. Wallace & Co.* (2), Lord Cranworth said this (3): "When a master employs a servant "in a work of a dangerous character, he is bound to take all "reasonable precautions for the safety of that workman. "This is the law of England no less than the law of Scotland. "It is the master's duty to be careful that his servant "is not induced to work under a notion that tackle or "machinery is staunch and secure when in fact the master "knows, or ought to know, that it is not so. And if from "any negligence in this respect damage arise, the master is "responsible."]

Where the cause of the accident is the fault of a fellow-servant, as in this case, the master is not liable: see per Lord Watson in *Johnson v. Lindsay & Co.* (4) Neither in *Sword v. Cameron* (5), nor in *Smith v. Baker* (6) was the defence put forward that the master's duty to take reasonable care is fulfilled if he delegates it to a properly qualified agent. *Butler v. Fife Coal Co.* (7) decided that there is a duty on a mine owner to appoint persons competent to deal with the dangers arising in the mine, and it was because they had failed in this duty that they were held liable in that case. If, as was said in *Toronto Power Co. v. Paskwan* (8), the master's attention has been called to some defect and he does nothing to remedy it, he is liable; otherwise not. To succeed in the claim the respondent must say that there is a complete warranty by the mine owners; and, if the appellants are held liable, they will be held to have committed a breach of duty owing to not interfering with the management of the mine which the Coal Mines Act, 1911, in express terms precludes them from doing. *Bain v. Fife Coal Co.* (9) was also referred to.

T. A. Gentles K.C. and James Walker (both of the Scots

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(1) [1932] 2 K. B. 309.

(2) (1854) 1 Macq. 748.

(3) Ibid. 751.

(4) [1891] A. C. 371, 383.

(5) 1 D. 493.

(6) [1891] A. C. 325.

(7) [1912] A. C. 149.

(8) [1915] A. C. 734, 738.

(9) 1935 S. C. 681.

H. L. (Sc.) Bar) and *Michael Marcus* (of the English Bar) for the respondent were not called upon.

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The House took time for consideration.

1937. July 19. LORD ATKIN. My Lords, I have had the opportunity of reading and considering the opinions which are about to be delivered by my noble and learned friends, Lord Thankerton, Lord Macmillan, Lord Wright, and Lord Maugham. I agree with them, and feel that it is unnecessary to add my own language to that which is used by them. In particular, I wish to state my concurrence in the views which they have expressed as to the valuable judgments pronounced by the Lord President in this case, and by the Lord Justice-Clerk in *Bain v. Fife Coal Co.* (1) on the English case of *Fanton v. Denville.* (2)

LORD THANKERTON. The respondent, who is an oncost workman in one of the appellants' coal mines, claims damages at common law from the appellants in respect of personal injuries sustained by him on March 27, 1933, while employed at the appellants' Glenraig Colliery in Fife. The case was tried before a jury on a general issue of fault, and, on the motion of the appellants, the trial judge, under Rules of Court II. 49, put specific questions to the jury, to which they returned answers. The judge directed the jury on these questions, and no exception was taken to his charge. Important questions of law were raised before the learned judge as to the application of the special verdict, and a reclaiming motion was taken by the present appellants against the interlocutor of Lord Jamieson, the trial judge, who applied the verdict in favour of the respondent. This motion was heard by the Second Division with three judges of the First Division, who were called into consultation except on an alternative argument of the present respondent. By a majority of five to two the decision of the Lord Ordinary was approved, and, in accordance therewith, his interlocutor was affirmed by the Second Division on July 17, 1936. The present appeal is taken against this last interlocutor.

(1) 1935 S. C. 681.

(2) [1932] 2 K. B. 309.

The facts may be briefly stated as follows. The respondent, on the date in question, was employed underground on the work of repairing an airway leading off the Mine Jigger Brae, one of the main haulage roads. When he was proceeding, at the end of the day shift, between 1.30 and 2 P.M., to the pit bottom by way of the Mine Jigger Brae the haulage plant was put in motion, and before he could reach one of the manholes provided he was caught by a rake of hutches and crushed between it and the side of the road. The respondent's case was that the time fixed by the appellants for raising the day-shift men up the pit was between 1.30 and 2 P.M., and that it was a necessary part of a safe system of working that the haulage should be stopped on the main haulage roads during this period, and that this was in accordance with usual and recognized mining practice in Scotland. The appellants denied this averment, and stated that there was an alternative road open for the respondent's return to the pit bottom, and that, in any event, he should have informed the man in charge of the haulage machinery, who was within easy call, of his emergence into the Mine Jigger Brae, and should not have proceeded along the Brae until he had ascertained that the haulage had stopped for the shift or arranged that he could safely proceed. They plead contributory negligence on the respondent's part. They also stated that the respondent was in breach of s. 43, sub-s. 1, and s. 74 of the Coal Mines Act, 1911.

[His Lordship read the questions put to the jury and their answers already set out and continued:] The question in the appeal arises on the first five questions and the answers of the jury. It may be explained that the appellants own five collieries, including Glencraig Colliery, and that the agent referred to above is appointed by their board of directors as their representative on the mining side in respect of all their collieries. The agent, in turn, selects a mine manager for each colliery, the appointments being approved by the board of directors. All the subordinate officials are selected and appointed by the mine manager. The agent and mine managers are appointed by the appellants to carry out the safety provisions of the Coal Mines Act and the Regulations. The

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H. L. (Sc.) fourth question and answer refer to s. 2, sub-s. 4, of the Coal
 1937 Mines Act, 1911, which provides that : " The owner or agent
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 AND " not take any part in the technical management of the mine
 CLYDE " unless he is qualified to be a manager." The appellants
 COAL CO. " unless he is qualified to be a manager." The appellants
 v. maintain that they cannot be responsible for a failure in the
 ENGLISH. technical management of the mine from which they are
 Lord excluded by statute.
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Counsel for the appellants admitted that primarily the
 master has a duty to take due care to provide and maintain a
 reasonably safe system of working in the mine, and he stated
 the question in the appeal as being whether a master, who has
 delegated the duty of taking due care in the provision of a
 reasonably safe system of working to a competent servant, is
 responsible for a defect in the system of which he had no know-
 ledge, and he submitted the following general propositions in
 law :

First—If the master retains control, he has a duty to see
 that his servants do not suffer through his personal negligence,
 such as (1.) failure to provide proper and suitable plant, if he
 knows, or ought to have known, of such failure ; (2.) failure
 to select fit and competent servants ; (3.) failure to provide a
 proper and safe system of working ; and (4.) failure to observe
 statutory regulations : but,

Second—If he delegates his duty to take care of the safety
 of his servants to competent subordinates, his responsibility
 in respect of his primary common law duty ceases, unless there
 is proof of knowledge by him not acted upon ; so that the master's
 liability in respect of his common law duty may be said to
 depend on the extent of his interference.

The appellants maintain that the present case is covered by
 the second proposition, in that they have delegated to a com-
 petent agent and manager the duty of providing a reasonably
 safe system of working, and that any negligence in the provision
 of such a system is the negligence of these delegates, and, under
 the doctrine of common employment, that the appellants are
 not liable therefor.

It seems to me that the fallacy in the appellant's argument

lies in the view that the master, being under a duty to take due care in the provision of a reasonably safe system of working, is absolved from that duty by the appointment of a competent person to perform the duty. In my opinion the master cannot "delegate" his duty in this sense, though he may appoint some one, as his agent in the discharge of the duty, for whom he will remain responsible under the maxim *respondeat superior*. It therefore becomes necessary to examine the nature and limits of the doctrine of common employment.

In *Johnson v. Lindsay & Co.* (1), Lord Watson said: "I do not agree with Baron Pollock, that the rule which exempts a master from liability to his servant for injuries negligently occasioned by a fellow-servant in the course of their common employment rests upon the absence of an implied contract by the master to recoup such damage. The master's responsibility for his servant's acts has its origin in the maxim '*Qui facit per alium facit per se*,' which has been construed as inferring his liability for what is negligently done by the servant acting within the scope of his employment. The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his master. . . . The principle of the master's immunity in such cases, frequently termed the doctrine of *collaborateur*, is of comparatively recent origin. In the law of England it can hardly be traced further back than *Priestly v. Fowler* (2), which was decided in 1837. It was rejected by the Courts of Scotland until 1858, when, for the first time in either country, it was fully explained and reduced to its proper limits by Lord Cranworth, in the Scotch case of *Bartonskill Coal Co. v. Reid*. (3) The doctrine had previously been formulated by the Supreme Court of Massachusetts, in a judgment delivered by Chief Justice Shaw,

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(1) [1891] A. C. 371, 382.

(3) 3 Macq. 266.

(2) (1837) 3 M. & W. 1.

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"which was referred to with approval by Lord Cranworth."

In *Bartonshill Coal Co. v. Reid* (2) the workman had been killed through the overturning of the cage, the engineman having failed to stop the ascending cage at the platform and having allowed it to be sent with great force up against the scaffolding. Clearly this involved no question of safe system of working. After dealing with the maxim respondeat superior, Lord Cranworth said (3): "But do the same principles "apply to the case of a workman injured by the want of care "of a fellow-workman engaged together in the same work? "I think not. When the workman contracts to do work of any "particular sort, he knows, or ought to know, to what risks he "is exposing himself; he knows, if such be the nature of the "risk, that want of care on the part of a fellow-workman may be "injurious or fatal to him, and that against such want of care "his employer cannot by possibility protect him. If such "want of care should occur, and evil is the result, he cannot say "that he does not know whether the master or the servant was "to blame. He knows that the blame was wholly that of the "servant. He cannot say the master need not have "engaged in the work at all, for he was party to its being under- "taken." This language is quite inappropriate, as it seems to me, to the risks involved in the conditions of safety under which the work is carried on, and for which it is the duty of the master to use due care in the provision of a reasonably safe system. That Lord Cranworth took this view is clear from his comments on the earlier Scots case of *Sword v. Cameron* (4), in which a workman employed in a stone quarry recovered damages from his employers for injuries received on the explosion of a shot in the quarry. Lord Cranworth said (5): "This case may be justified without resorting to any such "doctrine as that a master is responsible for injuries to a work- "man in his employ, occasioned by the negligence of a fellow- "workman engaged in a common work. The injury was

(1) (1842) 4 Metcalf, 49.

(2) 3 Macq. 266.

(3) Ibid. 284.

(4) 1 D. 493.

(5) 3 Macq. 290.

“evidently the result of a defective system not adequately
 “protecting the workman at the time of the explosions. . . .
 “The accident occurred, not from any neglect of the man who
 “fired the shot, but because the system was one which did not
 “enable the workmen at the crane to protect themselves by
 “getting into a place of security.” In *Bartonshill Coal Co. v. McGuire* (1), which arose out of the same accident and was decided at the same time as *Reid’s* case (2), Lord Chelmsford L.C. said (3): “In *Sword v. Cameron* (4) the system of blasting
 “in the quarry which had been established had been habitually
 “defective, and therefore, the injury which resulted might as
 “much be attributed to the employers as if they had supplied
 “defective machinery, for which undoubtedly they would have
 “been answerable.”

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It appears clear, then, that, when the workman contracts to do the work, he is not to be held as having agreed to hold the master immune from the latter’s liability for want of due care in the provision of a reasonably safe system of working. But the appellants maintain that the master absolves himself from the discharge of that duty if he appoints a competent servant to discharge the duty, and I will now examine the authorities on which this contention is sought to be based.

In *Wilson v. Merry & Cunningham* (5) the workman had been killed by an explosion of fire-damp in the pit, which had accumulated because of an obstruction of the system of ventilation by a platform which had been temporarily erected on the side of the pit-shaft under the direction of a pit manager to enable a seam to be opened. There was no suggestion that the system of ventilation was defective, but the temporary platform interrupted the free circulation of air. It was admitted that the owners had appointed competent persons for the work on which they were engaged. Lord Cairns L.C. said in a well-known passage (6): “The master is not, and cannot be, liable to his servant unless there be negligence on the
 “part of the master in that in which he, the master, has

(1) 3 Macq. 300.

(2) 3 Macq. 266.

(3) *Ibid.* 310.

(4) 1 D. 493.

(5) L. R. 1 H. L. (Sc.) 326.

(6) *Ibid.* 332.

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“contracted or undertaken with his servant to do. The master
 “has not contracted or undertaken to execute in person the work
 “connected with his business. The result of an obligation on
 “the master personally to execute the work connected with his
 “business, in place of being beneficial, might be disastrous to his
 “servants, for the master might be incompetent personally to
 “perform the work. At all events, a servant may choose for
 “himself between serving a master who does, and a master who
 “does not, attend in person to his business. But what the
 “master is, in my opinion, bound to his servant to do, in the
 “event of his not personally superintending and directing the
 “work, is to select proper and competent persons to do so, and
 “to furnish them with adequate materials and resources for the
 “work. When he has done this he has, in my opinion, done all
 “that he is bound to do. And if the persons so selected are
 “guilty of negligence this is not the negligence of the master.”

The appellants seek to apply that passage to the masters’
 duty as to provision of a reasonably safe system; but it is clear,
 in my opinion, that the Lord Chancellor, who had already
 stated that there was no question of a defective system of
 ventilation, was referring to the carrying out of the operations
 in the mine, and not to the provision of safe and proper
 conditions under which the operations were to be carried on.
 This view is confirmed by the speeches of the other noble
 and learned Lords. Lord Chelmsford said (1): “Although
 “the learned judge, in the course of his summing up,
 “distinguished ‘between keeping clear and in good working
 “‘order the ventilation arrangement or system when com-
 “‘pleted, and a defect or fault in the arrangement or system
 “‘itself,’ yet he does not appear to have left it to the jury
 “to decide whether the accident occurred through faulty
 “ventilation, or through casual obstruction in the ventilation,
 “the latter of which appears from the evidence to be more
 “likely to have been the case. But, supposing it to have
 “been quite clear that the ventilation itself was defective,
 “yet, if it occurred in the course of the operations in the pit,
 “it ought to have been distinguished from that ‘system of

“ ‘ ventilation and putting the mine into a safe and proper
 “ ‘ condition for working ’ which, according to the opinion
 “ ‘ of the Lord Justice-Clerk in *Dixon v. Rankin* (1), ‘ it was
 “ ‘ the duty of the master for whose benefit the work is
 “ ‘ being carried on to provide.’ In the course of working
 “ ‘ the Haughhead pit it became necessary to arrange a system
 “ ‘ of what, for distinction’s sake, I may call local ventilation.
 “ ‘ This must be considered as part of the mining operations,
 “ ‘ and therefore, even if the accident happened in consequence
 “ ‘ of the scaffold in the Pyotshaw seam having, under Neish’s
 “ ‘ orders, been constructed so as to obstruct the necessary
 “ ‘ ventilation, it would have been the result of negligence in
 “ ‘ the course of working the mine ; and if Neish and the
 “ ‘ deceased were fellow-workmen, it would have been one of
 “ ‘ the risks incident to the employment in which the deceased
 “ ‘ was engaged.’ ” Lord Colonsay said (2) : “ I think that
 “ ‘ there are duties incumbent on masters, with reference to
 “ ‘ the safety of labourers in mines and factories, on the fulfil-
 “ ‘ ment of which the labourers are entitled to rely, and for the
 “ ‘ failure in which the master may be responsible. A total
 “ ‘ neglect to provide any system of ventilation for the mine
 “ ‘ may be of that character. Culpable negligence in super-
 “ ‘ vision, if the master takes the supervision on himself, or,
 “ ‘ where he devolves it on others, the heedless selection of
 “ ‘ unskilful or incompetent persons for the duty, or the failure
 “ ‘ to provide or supply the means of providing proper machinery
 “ ‘ or materials, may furnish grounds of liability ; and there
 “ ‘ may be other duties, varying according to the nature of the
 “ ‘ employment, wherein, if the master fails, he may be
 “ ‘ responsible. But, on the other hand, there are risks incident
 “ ‘ to occupations more or less hazardous, and of which the
 “ ‘ labourer who engages in any such occupation takes his
 “ ‘ chance. It is eminently so in regard to mining operations.
 “ ‘ There are perils of the pit as well as of the other deep,
 “ ‘ and one of those perils is the risk of the consequences that
 “ ‘ may, even in the best regulated pits, result from the careless-
 “ ‘ ness or recklessness, or other fault, of one or more of those

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(1) (1852) 14 D. 420.

(2) L. R. 1 H. L. (Sc.) 344.

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“ persons composing the organised body engaged in working the mine ” ; and further (1) : “ Now, the direction of the learned judge, with reference to the circumstances of this case, appears to me to have been objectionable, for these reasons—First, it deals, apparently, with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which, in certain views, the defenders might be regarded as liable, whereas it was a defect in the construction of a temporary structure, erected by order of Neish for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defenders for the fault of Neish.”

I agree with the observations of the Lord President, in his admirable and lucid opinion in the present case, on these opinions in *Wilson v. Merry & Cunningham* (2) and I need not repeat them. In particular, Lord Chelmsford and Lord Colonsay clearly distinguish between duties relating to the actual working or operation of the mine and those which relate to the conditions of safety provided by the system under which such working or operation is carried on. The workman, under his contract of employment, is not to be held impliedly to have taken the risk of want of due care in the provision of a reasonably safe system of working, and the master cannot transfer the duty on to the shoulders of a subordinate. If he appoints a servant to attend to the discharge of such duty, such servant, in this respect, is merely the agent or hand of the master, and the maxim *qui facit per alium facit per se* renders the master liable for such servant's negligence as being, in the view of the law, the master's own negligence. The same servant may have other duties relative to the working or operation of the mine, as to which the doctrine of common employment might apply ; but that doctrine is not applicable to the provision of reasonably safe conditions under which the working or operation of the mine is to be carried on.

I do not find it necessary to deal in detail with the passages

(1) L. R. 1 H. L. (Sc.) 346.

(2) L. R. 1 H. L. (Sc.) 326.

from the judgments in the cases of *Smith v. Baker* (1); *Nimmo & Co. v. Connel* (2); *Monaghan v. Rhodes & Son* (3); and *McMillan v. Barclay, Curle & Co.* (4), which are referred to by the learned Lord President, with whose comments thereon I agree. They afford no assistance to the argument of the appellants, and are in conformity with the views I have expressed. But I will cite one sentence from the opinion of Lord Watson in *Smith v. Baker* (5)—namely: “But, as I understand the law, it was also held by this House, long before the passing of the Employers’ Liability Act (43 & 44 Vict. c. 42), that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself.” I agree with the Lord President that the principle of vicarious liability of the master has been uniformly applied to defective plant and defective premises, and is equally applicable in the case of defective systems. I may add a reference to the case in the Privy Council of *Toronto Power Co. v. Paskwan* (6), in which it was held that the duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. Sir Arthur Channell, who delivered the judgment of the Board, said: “It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants.” In *Cribb v. Kynoch* (7) and *Young v. Hoffmann Manufacturing Co.* (8) the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform

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(1) [1891] A. C. 325.

(2) [1924] A. C. 595.

(3) [1920] 1 K. B. 487.

(4) 1912 S. C. 263.

(5) [1891] A. C. 353.

(6) [1915] A. C. 734, 738.

(7) [1907] 2 K. B. 548.

(8) [1907] 2 K. B. 646.

H. L. (SC.) “ dangerous work, and that is a matter which it is fairly
 1937 “ obvious must in almost all cases be done for the master
 WILSONS “ by others.* The supplying of that which in the opinion
 AND “ of a jury is proper plant stands on rather a different footing.
 CLYDE “ It is true that the master does not warrant the plant, and if
 COAL CO. “ there is a latent defect which could not be detected by
 v. “ reasonable examination, or if in the course of working
 ENGLISH. “ plant becomes defective and the defect is not brought to the
 Lord “ master’s knowledge and could not by reasonable diligence
 Thankerton. “ have been discovered by him, the master is not liable, and
 “ further, a master is not bound at once to adopt all the
 “ latest improvements and appliances. It is a question of fact
 “ in each case, was it in the circumstances a want of
 “ reasonable care not to have adopted them ? ” In my opinion
 that passage equally states the law of this country, and I do
 not agree with the comments on this decision in the case of
Fanton v. Denville (1), to which I will now refer. As I have
 had the privilege of reading the opinion of my noble and
 learned friend Lord Wright, who makes a detailed criticism of
 the decision in this case, in which I entirely concur, I will only
 say, firstly, that the conclusion arrived at appears to me to be
 justified by the facts of the case, as accepted by the Court of
 Appeal, in that they do not disclose any defect in the materials
 supplied by the defendant, but an error of judgment on
 the part of his servants in selection of the properties necessary
 on a particular occasion for a particular purpose ; the extra
 baize was there and available. There was no suggestion that
 the mattress was defective in itself, but it was not by itself
 sufficient to break the fall of the plaintiff. In the case of a tour-
 ing company such as that in question, the selection of the
 particular properties to be used for a particular presentation
 may well be said to be part of the common work on which the
 employees are engaged, and the master, apart from knowledge
 imputable to him, will not be liable provided the properties
 have been provided with due care. In the second place, I am
 quite unable to agree with the construction placed by the
 learned Lord Justices on the opinion of Lord Cairns L.C. in

Wilson v. Merry & Cunningham (1), as to which I have already expressed my opinion. H. L. (Sc.)

There remains the recent case of *Bain v. Fife Coal Co.* (2), in which *Fanton's* case (3), came under the consideration of the Second Division of the Court of Session. I agree with comments of the Lord Justice-Clerk on *Fanton's* case (3), and will repeat them and adopt them, if I may: "This appears to me to be a startling whittling down of the duties which the law has hitherto recognized, at any rate in Scotland, as attaching to a master towards his servant. It ignores what has always been regarded as a fundamental doctrine of the law of master and servant—namely, that there are certain duties owed by a master to his servant, so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any of these duties. The master's liability as for breach of these paramount duties is unaffected by the doctrine of fellow-servant, for in the eye of the law they are duties that cannot be delegated. If, in fact, they are entrusted by the master to others, the maxim applies *qui facit per alium facit per se*. The duty may not be absolute, and may be only a duty to exercise due care, but, if, in fact, the master entrusts the duty to some one else instead of performing it himself, he is liable for injury caused through the want of care of that some one else, as being, in the eye of the law, his own negligence." That admirable statement of the law which, in my opinion, applies also in England, involves the rejection of the appellants' contentions, except the special contention that their exclusion from interference in the technical management by s. 2, sub-s. 4, of the Coal Mines Act, 1911, relieves them from responsibility, in view of the fourth answer of the jury. I agree with the opinion expressed by the five learned judges in the Court of Session who rejected this contention; neither of the learned judges who dissented

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(1) L. R. 1 H. L. (Sc.) 326.

(3) [1932] 2 K. B. 309.

(2) 1935 S. C. 681, 693.

H. L. (Sc.) appears to have expressed an opinion on this point. I agree with the Lord President's statement (1) : " There is no reason in principle that a compulsory delegation should displace the vicarious responsibility of the employer, if a de facto delegation, which is often unavoidable, has not this effect."

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" I hold that the responsibility is the same whether the employer is himself qualified to act as manager or not, and whether, if qualified, he chooses to act himself or to delegate to a qualified servant as manager. In all these cases he is answerable either directly for his own negligence or vicariously for his servant's negligence, if the negligence affects the provision of a safe system of working."

It is always difficult to define a principle of the law so precisely that its application to every combination of circumstances is beyond question, but I may at least express the hope that the decision in this appeal has narrowed the debatable area without being as optimistic as the reporter in the *Bartonshill* cases (2), who said, nearly eighty years ago, " Reid and McGuire were both victims of the same accident, which, though melancholy, has settled the law."

In my opinion the appeal fails and should be dismissed with costs.

LORD MACMILLAN. In this appeal your Lordships have to consider and accommodate the spheres of operation in the law of master and servant of two competing doctrines, the doctrine of vicarious liability and the doctrine of common employment. According to the former, a master is responsible for the negligence of his servant acting within the scope of his employment; according to the latter a master is not responsible for the negligence of his servant causing injury to a fellow-servant. Both doctrines are well established in the law. It is obvious that they may come into conflict. If a servant is injured by the negligence of a fellow-servant acting within the scope of their common employment, the former doctrine would impose liability on the master, while the latter doctrine would exculpate him. The question is,

(1) 1936 S. C. 902.

(2) 3 Macq. 307n.

Which of these two principles is applicable to the present case ? H. L. (Sc.)

I do not rehearse the facts already so fully and clearly set out by my noble and learned friend Lord Thankerton. But I emphasize the findings of the jury that on the occasion of the accident which befell the respondent there was not provided in the appellants' colliery a reasonably safe system of working ; that the accident was due to this failure to provide a reasonably safe system of working ; and that the defect in the system was known to the agent employed by the directors of the appellant company, but not to them personally. The negligence, be it observed, lay in the failure to provide a safe system, not in the working of the system provided.

In these circumstances the appellants say that they are not responsible for the accident because it was due to the negligence of their agent. Their duty, they say, was fulfilled when they appointed a competent agent to supervise the working of the colliery, a task which they were personally and indeed by statute disqualified from performing, and as the negligence was that of a fellow-employee of the respondent they should be absolved.

Now I take it to be settled law that the provision of a safe system of working in a colliery is an obligation of the owner of the colliery. He cannot divest himself of this duty, though he may—and, if it involves technical management and he is not himself technically qualified, must—perform it through the agency of an employee. It remains the owner's obligation, and the agent whom the owner appoints to perform it performs it on the owner's behalf. The owner remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him, and cannot escape liability by merely proving that he has appointed a competent agent. If the owner's duty has not been performed, no matter how competent the agent selected by the owner to perform it for him, the owner is responsible.

But then it is said that if the person injured in consequence of the non-performance of the owner's duty by the owner's agent is an employee of the owner there is no redress, because

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H. L. (Sc.) the agent is engaged in a common employment with the injured party and the latter took the risk of the negligence of his fellow-employees. To this the conclusive answer is that the agent engaged in discharging the owner's duty of providing a safe system of working in the mine is not engaged in a common employment with the ordinary workmen in the mine. He is not collaborating with them; he is performing the duty of the owner, not the duty of an employee. The doctrine of common employment implies that the employment must be common. The owner of a colliery is not engaged in a common employment with the miners who work in the colliery, and the agent carrying out the obligations of the owner is not collaborating with the workmen in the mine. Consequently the defence of common employment is not available to the mine-owner where an accident occurs to an employee in the mine through the negligent performance of the owner's duty by the person appointed by the owner to perform that duty for him; for such agent of the owner and the injured workman are not in this respect engaged in a common employment.

While adding these few observations I desire to express my concurrence in every respect with the views of my noble and learned friends, whose opinions I have had the advantage of reading in print. In particular, I should like to associate myself with Lord Thankerton's appreciation of the admirable opinions delivered by the Lord President in the present case and by Lord Justice-Clerk Aitchison in the case of *Bain v. Fife Coal Co.* (1)

LORD WRIGHT. I have had the advantage of reading in print the opinion which has just been delivered by my noble and learned friend Lord Thankerton, and am in agreement with it. The observations which I go on to make are directed to considering certain recent authorities in the Court of Appeal, which, it seems to me, contain propositions of law which contradict the settled authorities binding on this House in regard to the obligation of an employer towards his

employees, to use the more modern terminology. The Lord President has left to your Lordships the task of reconciling what the Court of Appeal have laid down with the authorities which he cites in his admirable judgment. It is clear, as has been said in this House, that on this branch of the law there is no difference between the law in England and in Scotland.

The principal decision of the Court of Appeal thus brought into question is *Fanton v. Denville*. (1) The facts of that case are somewhat obscure. The answers of the jury are inconclusive. The plaintiff does not appear to have established a breach by the employer of the duty owing by him to the servant as I shall define it hereafter. The result of the case may be correct, but I do not see that it was necessary for the Court of Appeal to lay down the proposition they did in regard to the precise extent of the duty which rests on the employer towards his employee. Greer L.J. (2) thus states, in agreement with what Scrutton L.J. said in the same case, that "even in cases where the negligence relied on by the plaintiff consists of negligence in the supply or maintenance of plant or machinery, the employer is only liable if personal negligence is proved, and that if the failure to supply or maintain the plant or machinery in a safe condition is due to the negligence of a manager to whom the duty has been entrusted by the employer, the employer is not responsible unless it can be shewn that he failed to use reasonable care to select a competent manager, or that he has in some way been guilty of personal negligence in connection with the instalment or maintenance of the machinery or plant or in permitting the continuance of its use after he became aware of its unsafe condition." Slesser L.J. agreed with Scrutton and Greer L.J.J. Similarly in *Rudd v. Elder Dempster & Co.* (3), Scrutton L.J., applying the view he had expressed in *Fanton's* case (1), held that the employer fulfilled his duty in regard to plant and system by using reasonable care to appoint competent foremen and overseers, and, if he fulfilled that duty, was not liable for the negligence of such

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(1) [1932] 2 K. B. 309.

(2) Ibid. 327.

(3) [1933] 1 K. B. 566.

H. L. (Sc.) foremen or overseers to their fellow-workmen.[†] Similarly,
 1937 Greer L.J. said (1): "If the system has been put into
 WILSONS "operation and is being carried out by his servants on his
 AND "behalf . . . he [the employer] is not responsible to his
 CLYDE "workpeople for injuries thereby caused. He is free from
 COAL CO. "liability unless it be proved that the injuries complained
 v. "of were caused by his own negligence or wilful act."
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 Lord Wright. Lawrence L.J. agreed.

In my judgment these statements are directly contrary to opinions and decisions of this House and of the Court of Appeal over a long period of years. In *Lochgelly Iron and Coal Co. v. McMullan* (2), this House overruled the decision of the Court of Appeal in *Rudd's* case (3), on the scope of the employers' liability to his workpeople for breach of a statutory duty. In *Rudd's* case (3) the Court of Appeal, applying their general views which I have just stated, held that the employers could escape liability by showing that they had appointed competent servants to see that the duty was fulfilled. This House held that, on the contrary, the statutory duty was personal to the employer, in this sense that he was bound to perform it by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible.[‡] When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold—"the provision of a competent staff of men, "adequate material, and a proper system and effective "supervision"; I repeat the statement of the duty by Lord M'Laren quoted with approval by Lord Shaw in *Black v. Fife Coal Co.* (4), and again approved in the *Lochgelly* case. (5)

(1) [1932] 1 K. B. 597.

(2) [1934] A. C. 1.

(3) [1933] 1 K. B. 566.

(4) [1912] A. C. 149, 173.

(5) [1934] A. C. 1, 28.

The rule has been stated so often that I hesitate to multiply authorities. What the Court of Appeal have said amounts to reducing the three heads of duty to one only—that is, to engage competent employees of the higher grades and then everything else may be left to them. If that is done, the employers, it seems, will be free from further responsibility. Those whom they have engaged, if chosen with due care and skill, may appoint any other employee, may deal with the provision of plant and material, may determine the system of work. However negligently they may act and however dangerous the results of what they do may be to the work-people, the employers on this view will be free from liability. The employee will have no remedy against the employer. His only remedy will be against his fellow-employee, which will be difficult to establish and in all probability worthless.

The well-established, but illogical, doctrine of common employment is certainly one not to be extended, and indeed has never in its long career been pushed so far as the Court of Appeal sought to push it. Even in *Farwell v. Boston Railroad Co.* (1), the fons et origo (I almost add “mali”), Shaw C.J. reserved the question of an employer’s obligations in respect of adequacy of plant and competence of fellow-workmen.

In *Hutchinson v. York, Newcastle & Berwick Ry.* (2), where the doctrine of common employment was first laid down in this country, Alderson B. said that the doctrine must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. I do not read this as limited merely to the selection of competent servants. In *Williams v. Birmingham Battery Co.* (3), in a judgment concurred in by Vaughan Williams L.J., A. L. Smith L.J. quotes and applies the words of Lord Herschell in *Smith v. Baker* (4): “It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject

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(1) 4 Metcalf, 49.

(2) (1850) 5 Ex. 343.

(3) [1899] 2 Q. B. 339.

(4) [1891] A. C. 325, 362.

H. L. (SC.) "those employed by him to unnecessary risk." In *Young v. Hoffmann Manufacturing Co.* (1), Kennedy L.J. states that the employer vis-à-vis his employees undertakes (inter alia) (a) to use reasonable care in the selection of competent fellow-servants; (b) in having and keeping his machinery, the use of which might otherwise be dangerous to the servant in his employment, in proper condition and free from defect. I have chosen these few examples to show that the doctrine of common employment which was hinted at in connection with a butcher's cart and has roamed in its application to colliers, seamen, railwaymen, apprentices, chorus girls, and indeed every sphere of activity, has always distinguished between the employer's duty to the employee and the fellow-servant's duty to the employee. The rule is explained on the ground that the employee by his contract of employment agrees with his employer to assume the risk of his fellow-servant's negligence. The principle is stated, with little regard to reality or to modern ideas of economics or industrial conditions, to be that this particular risk is included in the agreed remuneration. This result is stated rather as a dogma to flow logically from the relation of master and servant. Notwithstanding repeated expressions of disapproval, the doctrine has survived, largely because of statutory remedies given to employees to minimize what to modern ideas appears to be its obvious injustice. But it has never been carried to the extremity of excluding all remedy against employers or all duty in the employers so long as they have exercised care in the selection of managers or foremen. It is difficult to see what that duty would mean in the case of an absentee or infant or inexperienced employer, or what it would mean in the case of a great modern industrial concern. But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to be performed by the employer per se or per alios. If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence or to take reasonable care to provide

a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert; the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance.

The extent of the employer's obligation has several times been stated by this House. Thus in *Wilson v. Merry & Cunningham* (1), Lord Cairns said: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work." To this must be added a third head—namely, to provide a proper system of working (see per Lord Colonsay in *Merry's* case). (2) By this is meant, not a warranty, but a duty to exercise (by himself and his servant and agents) all reasonable care. In addition to *Merry's* case (1), I may refer as authorities to the same effect to *Brydon v. Stewart* (3); *Bartonshill Coal Co. v. McGuire* (4); *Weems v. Mathieson* (5), in which Lord Wensleydale said (6): The employer "was responsible for what he was responsible for in point of law—namely, the defect on his part in not providing good and sufficient apparatus, and in not seeing to its being properly used." These latter words I take to refer to system. It was the effect of these and similar cases in this House that was compendiously and accurately expressed in *Smith v. Baker* (7), by Lord Halsbury, Lord Watson, and Lord Herschell. Lord Herschell's language has already been quoted by me. Lord Watson said (8): "It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth, and other noble and

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(1) L. R. 1 H. L. (Sc.) 326, 332.

(2) Ibid. 344.

(3) (1855) 2 Macq. 30.

(4) 3 Macq. 300.

(5) 4 Macq. 215.

(6) Ibid. 226.

(7) [1891] A. C. 325.

(8) Ibid. 353.

H. L. (Sc.) “learned Lords, that it is needless to quote authorities in
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“support of it.” In the Court of Appeal these observations were put aside. It was said they were obiter dicta, which may in one sense be true, but though the issue was concluded by what happened in the county court, this House thought fit to explain the reason on which the employers could properly be held liable—namely, the defective system of working. It was said that the observations need not be seriously considered, because the relevant authorities were not cited to their Lordships. It would, however, be strange to imagine that these three great lawyers did not trouble to appreciate the authorities relevant to the principles which they were enunciating. But Lord Watson does actually refer to and quote from *Bartonshill Coal Co. v. McGuire* (1); *Bartonshill Coal Co. v. Reid* (2); and *Weems v. Mathieson* (3), and explain *Sword v. Cameron*. (4) I venture with all respect to say that in my opinion it was the failure of the Court of Appeal to appreciate the effect of these authorities which led them to lay down the rules which they did, and to fall into the fallacy of not distinguishing between what has been called the master’s province of duty and what has been called the servant’s province of duty to his fellow-servants.¹ When it is said that the workman takes the risk of his fellow-workman’s negligence, it must be added that he does not take the risk of his master’s negligence. The distinction between these provinces of duty was fully discussed in, among other places, *Merry’s case*. (5) The workman did not succeed there because it was held that the actual defect in the ventilation of the pit was not a defect in the system of ventilation for which the employers were liable, but a defect caused by a temporary structure erected in the actual conduct of the operations owing to error of judgment on the part of the mine’s manager, who was a fellow-workman within the rule of common employment. It may often be difficult to draw the line in any particular case between these two categories. But the Court of Appeal

(1) 3 Macq. 300.

(2) 3 Macq. 266.

(3) 4 Macq. 215.

(4) 1 D. 493.

(5) L. R. 1 H. L. (Sc.) 326.

seem to base their conclusion on a number of cases in which the negligence was that of those who were fellow-servants, however exalted their grade. *Wigmore v. Jay* (1), which was strongly relied on by Scrutton L.J. in *Fanton's* case (2), was, I think, such a case. The use of the defective scaffold pole may well have been merely an act of negligence on the part of the foreman, the master having taken due care to provide a proper supply of scaffold poles. I think the same observation applies to the other cases cited by Scrutton and Greer L.JJ. Thus *Cribb v. Kynoch* (3) and *Young v. Hoffmann Manufacturing Co.* (4), are cases in which the foreman, being generally competent, was negligent in the instruction of the young person or apprentice, a particular duty which was reasonably held to appertain to the fellow-servants' and not to the employers' province. If in any of these cases the principles which I have stated as to the extent of the master's duty are not correctly applied to the facts, such decisions cannot stand against the authorities in this House to which I have referred. But I doubt if there is any such case. In *Toronto Power Co. v. Paskwan* (5), Sir Arthur Channell, delivering the judgment of the Privy Council, aptly observed: "It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants." I think that the decision was correct and that its effect was accurately stated in the headnote.

There is perhaps a risk of confusion if we speak of the duty as one which can, or cannot, be delegated. *The true question is, What is the extent of the duty attaching to the employer? * Such a duty is the employer's personal duty, whether he

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(1) 5 Ex. 354.

(2) [1932] 2 K. B. 320.

(3) [1907] 2 K. B. 548.

(4) [1907] 2 K. B. 646.

(5) [1915] A. C. 734, 738.

H. L. (Sc.) performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. 1937
 WILSONS AND CLYDE COAL CO. v. ENGLISH. Lord Wright. A failure to perform such a duty is the employer's personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing. As Lord Macmillan said in the *Lochgelly* case (1), with reference to a duty to take care: "It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case, and in either case it is a duty imposed by law." To the same effect Lord Atkin says (2): "Where the duty to take care is expressly imposed upon the employer and not discharged, then in my opinion the employer is guilty of negligence and of 'personal' negligence." The same opinion is expressed by the other members of the House who took part in that case. The House in overruling *Rudd's* case (3) did, I think, inferentially overrule *Fanton's* case. (4)

It is not perhaps necessary to add that the employer's duty at common law in these matters is not affected by the Workmen's Compensation Act or by the Employers' Liability Act.

I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained. Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not, however, broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow-servant or a merely temporary failure to keep in order or adjust plant and appliances or a casual departure

(1) [1934] A. C. 1, 18.

(2) *Ibid.* 9.

(3) [1933] 1 K. B. 566.

(4) [1932] 2 K. B. 309.

from the system of working, if these matters can be regarded as the casual negligence of the managers, foreman, or other employees. It may be difficult in some cases to distinguish on the facts between the employers' failure to provide and maintain and the fellow-servants' negligence in the respects indicated. I have already referred to *Wilson v. Merry & Cunningham* (1), the same distinction was discussed in *Hedley v. Pinkney* (2), where it was held that there was no fault of the employer but only negligence of the fellow-servant, the shipmaster. *Griffiths v. London and St. Katherine Docks Co.* (3) is, on the facts, as I think, such a case, though the judgments are unsatisfactory because this distinction was not clearly appreciated. The same failure to appreciate this distinction may be seen in some other cases relied upon by the Court of Appeal in *Fanton's* case (4), and indeed may account for the conclusions enunciated by the Court of Appeal.

In the result I am of opinion that the true rules of law (common both to English and Scots law) on the subject have been stated by the Lord President and those of his learned brethren who formed the majority of the Court. I agree that the appeal should be dismissed.

LORD MAUGHAM. I agree with the opinions which your Lordships have expressed, and will add only a few observations. I am induced to do so only because the law in England on this topic is, in my opinion, the same as that in Scotland, and the case is one of great general importance.

The law now in force applicable to this appeal depends on authority. It was laid down before the passing of the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897 (a forerunner of the Act of 1906), by which the hardship often suffered by workmen by reason of injuries suffered by them in the course of their employment was to a considerable extent mitigated. The result of the cases referred to by my noble and learned friends may, I think, be stated provisionally in the following propositions.

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(1) L. R. 1 H. L. (Sc.) 326.

(2) [1894] A. C. 222.

(3) (1884) 12 Q. B. D. 493.

(4) [1932] 2 K. B. 309.

H. L. (Sc.) The first proposition is that, subject as next mentioned,
 1937 the employer is responsible to an employee for an accident
 WILSONS caused by the negligence of any other employee acting within
 AND the scope of his authority. The maxim respondeat superior
 CLYDE applies : *Smith v. Baker*. (1)
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ENGLISH. The second, which is in the nature of a proviso or exception
 Lord Maugham. to the first, is that the general principle does not apply when
 ——— the accident occurs through the negligence of a fellow-
 employee in the course of the working of the factory, mine,
 or other business. This doctrine, called that of "common
 "employment," rests according to very high authority on the
 implication in the contract of service of an undertaking by
 the employee to bear the risks arising from the possible
 negligence of a fellow-employee selected with due care by the
 employer : *Bartonshill Coal Co. v. Reid* (2) ; *Johnson v.*
 Lindsay & Co. (3)

The third, which is a kind of limitation or explanation
 of the second, is that in the case of employments involving
 risk, that rule applies only when the maxim *volenti non fit*
injuriam can fairly be invoked. In such employments it was
 held that there was a duty on the employer to take reasonable
 care and to use reasonable skill, first, to provide and maintain
 proper machinery, plant, appliances, and works ; secondly,
 to select properly skilled persons to manage and superintend
 the business ; and thirdly, to provide a proper system of
 working. In these cases it was held that it was contrary
 to all probability to assert or to assume that the employee
 contracted on the basis that he was aware of risks in respect
 of these matters or that he impliedly agreed to take them
 upon himself. These matters, therefore, were in the province
 of the employer, and in the case of negligence in regard to them
 the employee could recover and the doctrine of common
 employment could have no application.

So far as these propositions are concerned I think the
 authorities cited by your Lordships are clear and decisive ;
 and I will add that I am in complete agreement with the view

(1) [1891] A. C. 325.

(2) 3 Macq. 266.

(3) [1891] A. C. 371.

which has been expressed as regards the true meaning of a passage in the speech of Lord Cairns L.C. in *Wilson v. Merry & Cunningham*. (1) H. L. (Sc.) 1937

We now come to the real point in the present case, which may be stated thus: Admitting that the employer was liable to provide a reasonably safe system of working the colliery, was not this a liability which he could delegate to skilled persons with the consequence that his personal liability would be discharged? It must, I think, be admitted that in England the early authorities on this point were not very clear. In Scotland it was not so. The admirable opinions of the Lord Justice-Clerk in *Bain v. Fife Coal Co.* (2), and of the Lord President in the present case, establish in my view that there has been a long and uniform practice in Scotland, repeatedly approved in this House, to the effect that an employer cannot divest himself of responsibility in regard to the three matters which are in his peculiar province.

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This view is decisive of the present appeal; but counsel for the appellant in his persuasive argument relied so strongly on the English case of *Fanton v. Denville* (3), that it would not be right to abstain from dealing with that case. My learned and noble friend Lord Wright has carefully examined the decision and has stated the English authorities, including the decision of the Privy Council in *Toronto Power Co. v. Paskwan* (4), and I am in complete accord with what he has said.

It has already been pointed out that the employers' liability is discharged by the exercise of due care and skill; and I may be allowed to point out that it is this circumstance which has led on occasion to a misapprehension of the true position. An illustration will demonstrate the mistake. Suppose some new machinery is necessary in a factory, and the employer is absent or completely unskilled in such things. He necessarily leaves the matter to a manager, let us suppose a highly skilled person, who, however, is negligent in this case. An accident follows, due to a defect in the machine. If the liability of the

(1) L. R. 1 H. L. (Sc.) 326.

(2) 1935 S. C. 681.

(3) [1932] 2 K. B. 309.

(4) [1915] A. C. 734.

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employer is stated as being an obligation to use his best endeavours to supply and instal good machinery, it may well be said on his behalf that he left the matter to a highly skilled man, and it may be asked with force, what more could he do ? I should reply, nothing ; but I should add that the premise is incorrect. The possessive pronoun " his " is that which leads to the error. The proposition would be more correctly stated to be that his duty is to supply and instal proper machinery so far as care and skill can secure this result. He can, and often he must, perform this duty by the employment of an agent who acts on his behalf ; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employers' duty. This has sometimes been expressed by saying that the duty is personal to the employer ; but the adjective if unexplained is apt to mislead, like the word " absolute " and the word " delegate." The employer can, of course, and frequently must delegate the performance of any of his duties to skilled agents ; but it would need an altogether new implied term in the contract between employer and employee before a Court could properly hold that this delegation has the result of freeing the employer from his liability. This becomes apparent if we imagine the contract between employer and workman to be written out in full with all the implied clauses. There would be, for the reasons given by the Lord Justice-Clerk in *Bain v. Fife Coal Co.* (1), and by your Lordships, no clause to the effect that the employer was to be freed from his special obligations to the workmen if he delegated them to an agent ; and in the absence of such a clause the employer would plainly remain liable if the agent was guilty of not using proper care and skill, since in the contract law of Scotland as in England it is impossible to get rid of a liability towards the other party to the contract without the consent of that party. I will express my opinion, agreeing with that of my noble and learned friend, Lord Thankerton, that on the facts as reported the decision in *Fanton v. Denville* (2), was right. For the reasons already given by your Lordships some of the dicta in that

(1) 1935 S. C. 681.

(2) [1932] 2 K. B. 309.

case must be regarded as contrary to authority and in principle unsound. H. L. (Sc.)

There remains for consideration only the special circumstance that the appellants, not being possessed of the necessary technical qualifications, were prohibited from taking part in the technical management of the mine by s. 2, sub-s. 4, of the Coal Mines Act, 1911. On this point (as in others), I am in complete agreement with the opinion of the Lord President already cited by my noble and learned friend Lord Thankerton, and have nothing to add.

I agree with the opinions already expressed that the appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Beveridge & Co., for Wallace & Begg & Co., W.S., Edinburgh, and J. A. McAra, Glasgow.*

Solicitors for respondent: *Golding, Hargrove & Golding, for Fred. Robinson, Edinburgh, and J. T. Tinman & Co., Dunfermline.*

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[HOUSE OF LORDS.]

H. L. (Sc.)* COLTNESS IRON COMPANY, LIMITED . APPELLANTS ;

1937
June 4 ;
July 19. SHARP AND
RESPONDENT.

Coal Mine—Dangerous machinery—Obligation to fence—Omission to fence—Breach of statutory duty—“ Not reasonably practical to avoid “ or prevent the breach ”—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), ss. 55, 102, sub-s. 8.

In the appellants’ coal mine was a machine which when in motion should by virtue of s. 55 of the Coal Mines Act, 1911, be kept securely fenced. The machine was not working properly and the engineer made certain adjustments, and having done so he set the machine in motion, and in order to test its running he removed the guard, as, without doing this, he could not observe its working. While the guard was off, the respondent, a workman in the mine, in passing it, slipped, and his hand was caught in the unprotected gearing and was injured. To an action claiming damages in respect of this injury the appellants pleaded that they were exempted from liability by virtue of s. 102, sub-s. 8, of the Act of 1911, inasmuch as it “ was not reasonably practicable “ to avoid or prevent the breach ” of the statutory obligation to keep the machine securely fenced, inasmuch as it was essential at the material time to have the guard off the machine.

Held, that as it was not reasonably practicable to keep the gearing securely fenced when it had to be observed while being tested, and as it would have been impossible to have observed its working if it had been protected by the guard, the appellants were entitled to the protection from liability given by s. 102, sub-s. 8, of the Act.

Decision of the First Division of the Court of Session reversed.

APPEAL from the First Division of the Court of Session.

The pursuer, the present respondent, sued the appellants claiming damages in respect of injuries sustained to his right hand on August 20, 1935, when he was in the employment underground in the appellants’ colliery No. 2 Climpy, Lanarkshire, in these circumstances: on one of the main underground roadways in the colliery was a loader plant near to the coal face. Along the coal face to the right of

* *Present* : LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

the roadway was placed a belt conveyor plant, and along the coal face to the left of the roadway was a pan-shaker plant, these two plants when in operation delivering coal on to the loader plant. The loader, belt and shaker were all operated by separate electric motors, the belt motor being near to the loader, but the shaker motor being at the end of the shaker plant remote from the loader.

The respondent, a lad of seventeen, had to attend to the belt motor and do incidental duties, including the keeping of the junction of the belt plant and the conveyor plant free from coal. When the loader started, it was his duty immediately to pass the word for the shaker conveyor to be started, and then himself start the belt conveyor motor.

The loader was placed on rails situated nearer to the left-hand side than to the right-hand side of the roadway looking towards the face. At the time of the accident giving rise to the action there was a considerable quantity of timber on the roadway to the right of the loader.

On the left-hand side of the loader there was a guard that covered "sprocket gearing," i.e., toothed wheels and a chain that conveyed the power from the loader motor to the loader apparatus.

It appeared that for some days before the accident the driving chain of the loader had been giving trouble. The links of the chain had stretched and were not meshing properly with the two sprocket wheels, and the engineer, Hawson, had decided to fit a new chain. On the day before the accident he fitted the new chain, and on running the machine found that some adjustment was necessary in a jockey pulley which helped to keep the chain on the sprockets. He removed this pulley and put the guard back over the wheels before taking the pulley to the surface with him. On the day of the accident he brought the adjusted pulley with him and proceeded to fix it and test the running of the machine. For this purpose it was necessary for him first to stop the loader and remove the guard, and secondly, to run the machine with a full load (the guard being still off) in order to see if, as a result of the adjustments he had made, the

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The respondent's case rested on the averment that the accident to him was due to the appellants' failure to carry out the statutory duty of fencing the machine imposed by s. 55 of the Coal Mines Act, 1911. (1)

The appellants contended that if there was any breach of statutory duty they were protected by s. 102, sub-s. 8, of the Coal Mines Act, 1911. (2)

At the trial Lord Wark held that it was reasonably practicable to fence off the road on the left-hand side of the loader by a barrier which would have caused no difficulty to Hawson and would have prevented the respondent coming near the machine. He accordingly gave judgment for the respondent for 500*l.*

On appeal the First Division (the Lord President, Lord Morison, Lord Fleming and Lord Moncrieff—Lord Morison dissenting) affirmed the judgment of Lord Wark.

The defenders appealed to this House.

Erskine Hill (of the English Bar and K.C. of the Scots Bar) and *T. B. Simpson* for the appellants. As it was essential that during the inspection and testing of the machine the ordinary guard should be removed, it was not possible during that period for the appellants to comply with the requirements of s. 55 of the Coal Mines Act, 1911, and in those circumstances they are entitled to the protection of s. 102, sub-s. 8, it being

(1) Coal Mines Act, 1911, s. 55 :
 " Every fly-wheel and all exposed
 " and dangerous parts of the
 " machinery used in or about the
 " mine shall be kept securely
 " fenced."

(2) Coal Mines Act, 1911, s. 102,
 sub-s. 8 : " The owner of a mine
 " shall not be liable to an action
 " for damages as for breach of
 " statutory duty in respect of any
 " contravention of or non-com-
 " pliance with any of the provisions
 " of this Act if it is shown that it
 " was not reasonably practicable
 " to avoid or prevent the breach,"

shown that "it was not reasonably practicable to avoid or prevent the breach."

[They were stopped.]

Robert Gibson K.C. and *T. J. D. Connolly* (both of the Scots Bar) for the respondent. The Coal Mines Act, 1911, places a very stringent duty upon mine-owners to ensure that all dangerous machinery shall be kept securely fenced. This machine was not securely fenced, and it was owing to the absence of fencing that the accident happened. If it was necessary to remove the guard while Hawson tested the running of the machine, a temporary fencing should have been put up to prevent the possibility of accident. That was not done, and by reason of that neglect the appellants are excluded from the protection of s. 102, sub-s. 8. In *Wales v. Thomas* (1) the words "reasonably practicable" were considered and it was said that they did not relate to the carrying on of the mine as a profitable concern, but to physical or engineering difficulties in the way of carrying out the rules. Here we contend there were neither physical nor engineering difficulties in the way of fencing off this dangerous machine. [They also cited *Hong Kong & Whampoa Dock Co. v. Netherton Shipping Co.* (2); *Connell v. Nimmo & Co.* (3); and *Crane v. Baird & Co.* (4)]

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The House took time for consideration.

1937. July 19. LORD ATKIN. My Lords, I have had the opportunity of reading the opinions about to be delivered by my noble and learned friends Lord Thankerton and Lord Macmillan, and as I agree with the result at which they have arrived I find it unnecessary to say more than a few words. In the facts of this case where the dangerous machinery was exposed for only a few minutes as the only means of effecting necessary repairs in a part of the mine where it was unlikely that any workman would be exposed to risk of contact with the machine other than the engineer engaged in the work of

(1) (1885) 16 Q. B. D. 340.

(2) 1909 S. C. 34.

(3) 1923 S. C. 737.

(4) 1935 S. C. 715.

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repair, I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of s. 55. The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate that I think the defence is proved. This seems to me to be all that need be decided. I am myself not prepared to go the length of saying that if dangerous machinery has to be exposed in motion for a considerable time for the purpose of effecting or testing repairs, s. 102, sub-s. 8, would afford a defence in cases where workmen in the mine would inevitably pass and be exposed to risk, and where it would be reasonably practicable by screens or otherwise to avoid the risk. I think that it is at least possible reasonably to contend that one does fence the dangerous parts of a machine by fencing the whole: and that "fence" may mean no more than adopt physical means for keeping persons away from dangerous parts. I do not think that this question arises for decision in the facts of this case and I prefer to keep it open. I agree that the appeal should be allowed.

LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion about to be delivered by my noble and learned friend Lord Macmillan, in which the circumstances under which the present question arises are fully set out, and it is unnecessary for me to repeat them. I agree with the opinion of my noble and learned friend, but, as it involves a reversal of the conclusions of the majority of the learned judges of the First Division of the Court of Session and of the Lord Ordinary, I desire to add some observations.

The respondent's case is solely founded on a breach of the statutory duty imposed by s. 55 of the Coal Mines Act, 1911, which provides that "Every fly-wheel and all exposed "and dangerous parts of the machinery used in or about "the mine shall be kept securely fenced." The breach of s. 55 is admitted, but the appellants claim to have established the statutory defence provided by s. 102, sub-s. 8, "that it "was not reasonably practicable to avoid or prevent the

"breach." This was on the ground that it was impossible for the engineer to test the loader under ordinary working conditions without removal of the guard which admittedly protected the dangerous parts of the machine when in place. All the learned judges have accepted the impossibility of so testing the loader without removal of that guard. But the majority of the learned judges and the Lord Ordinary have held that the breach could have been avoided or prevented by adopting the suggestion made by an expert witness at the proof. The Lord President says: "In my opinion, when "the ordinary cover was removed from the sprocket gear "it became the duty of the defenders under the Act to "consider what could be done so as to fence the sprocket "gear as securely as the circumstances allowed. No doubt "it was impossible to devise a fence which would exclude "the engineer; and it may not have been possible to devise "a fence which, so far as other workmen were concerned, "was as secure as the cover which had been removed. But "it by no means followed that the sprocket gear could not "be kept securely fenced so as to protect workmen other "than the engineer; and I think that if such a fence had "been erected, breach of s. 55 would have been avoided." The other learned judges of the majority and the Lord Ordinary expressed a similar view.

My Lords, s. 55 imposes an absolute obligation to keep the dangerous parts of a machine fenced. The obligation is not qualified by any such words as "so far as practicable "under the circumstances." In the first place, fencing the access to a machine is not fencing the parts of a machine. There can be no doubt that the purpose of s. 55 is mainly to protect those who are operating the machine, but when no operator requires access to the machine while in motion, a complete exclusion of access, while the machine was in motion, might be held to be in compliance with the section; I express no opinion on that, but I have some doubt whether anything short of complete exclusion of every one would be in compliance with the statutory obligation. In the second place, it seems clear to me that, if the suggested partial

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exclusion of access would not have been sufficient compliance with s. 55 as an initial installation, it cannot come in as a sort of second-best, *faute de mieux*, when the proper guard requires to be removed for the temporary purpose of testing the running machine. There is no such provision to be found either in s. 55 or s. 102, sub-s. 8. I am therefore of opinion that the proposed partial exclusion of access would not have been in compliance with s. 55, and that, accordingly, it would not have avoided or prevented the breach caused by the removal of the proper guard. I would only add that I agree with the clear and well-reasoned opinion of Lord Morison. The question of any duty to take reasonable care imposed on the owners by the common law does not arise in the present case.

I concur in the motion about to be proposed by my noble and learned friend.

LORD MACMILLAN. My Lords, by s. 55 of the Coal Mines Act, 1911, it is provided that "Every fly-wheel and all "exposed and dangerous parts of the machinery used in or "about the mine shall be kept securely fenced." On the morning of August 20, 1935, the respondent, who was employed by the appellants in one of their collieries in Lanarkshire, sustained injuries by coming in contact with an exposed and dangerous part of the machinery used in the mine which is admitted not to have been at the time securely fenced. Founding on this breach of statutory duty on the part of the appellants the respondent raised the present action of damages against them. The only defence which your Lordships have to consider is furnished to the appellants by s. 102, sub-s. 8, which enacts that "The owner "of a mine shall not be liable to an action for damages as "for breach of statutory duty in respect of any contravention "of or non-compliance with any of the provisions of this "Act if it is shown that it was not reasonably practicable to "avoid or prevent the breach." The appellants accepted the burden of proving that on the occasion in question it was not reasonably practicable to avoid or prevent their

breach of the statutory duty imposed on them by s. 55 and they maintain that they have discharged this burden. Both the Lord Ordinary and the First Division of the Court of Session (Lord Morison dissenting) held that the appellants had failed to do so. Your Lordships have now to review that decision. What is "reasonably practicable" is obviously a question of the circumstances of the particular case, and it therefore becomes necessary to set out the relevant facts.

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It appears that in one of the main roadways of the pit there is a loading plant near the coal face at the end of the road. The coal is fed to the loader by a conveyor and delivered by the loader into hutches. The plant is worked by an electric motor from which the power is transmitted to the loader by means of a sprocket gearing, that is by toothed wheels and a chain. The wheels and chain when in motion are dangerous and were provided with a guard which kept them securely fenced. The loader was placed two or three feet from the building on the left-hand side of the road and about seven feet from the right-hand side of the road.

On the loader being examined on the day before the accident by a mechanical engineer employed at the colliery, it was found that the chain was slipping. A new chain was fitted that afternoon and on running the machine it proved necessary to adjust a jockey pulley, whose purpose is to assist in keeping the chain on the sprockets. The engineer took this pulley with him to the surface for the necessary adjustment, and on returning to the loader next morning at the beginning of the day shift he proceeded to fix the pulley in position. To enable him to do so he had to stop the machine and remove the guard protecting the chain and sprocket gearing. Having fixed the pulley he set the machine in motion to test its running, and in order that he might observe its action he did not replace the guard. Meantime the respondent, who was employed to attend to the conveyor close by which brought coal from the face to the loader, had, as it was his duty to do, stopped the conveyor when the

H. L. (Sc.) loader was stopped. He came over to the loader to see what
1937 the engineer was doing to it and stood watching behind him
COLTNESS in the narrow passage-way two or three feet wide between
IRON CO. the machine and the building on the left hand. When the
v. engineer had placed the jockey pulley in position and set
SHARP. the machine in motion for a trial run the respondent started
Lord Macmillan. to hurry back to his place beside the conveyor. Unfortunately,
as he was passing alongside the loader he slipped on the
pavement and his right hand, which he put out to save himself,
was caught in the unprotected sprocket gearing and seriously
injured.

Such being the facts, the question is whether the appellants are in the circumstances entitled to say that it was not reasonably practicable to avoid or prevent the breach of statutory duty which they undoubtedly committed in not having the gear of the loading machine securely fenced at the time of the accident to the respondent. I am of opinion that they are. It was obviously necessary to remove the guard from the gear in order to fix the jockey pulley in position. This was done while the machine was not in motion and consequently without creating any danger. Then the engineer required to test the running of the machine and to see whether the appliance which he had just fitted was working properly and safely. He could not have done this if he had replaced the guard before starting the machine, for in that case the gear would have been hidden from observation. The gear can have been unfenced only for a very brief time after the machine was started before the accident occurred, and certainly not longer than was necessary for the observation of its working after the repair. As the engineer says, "it was a quick job." Doubtless the engineer would have replaced the guard whenever he was satisfied by observation that the machine was running satisfactorily. Unhappily the respondent happened to be there and to stumble just at the moment when the gear was temporarily unprotected.

In my opinion it is difficult to conceive of a case to which the statutory excuse ought to be held to apply, if it does

not apply to this case. I asked counsel who appeared for the respondent to instance circumstances would which render it not reasonably practicable to keep the gearing securely fenced, but I received no satisfactory answer. It was not only not reasonably practicable to keep the gearing securely fenced when it had to be observed on the test run, but it would have been impossible to have observed its working if it had been protected by the guard.

It has been held by the majority of the learned judges in the Court of Session that the appellants have not established their defence, because it would have been reasonably practicable to have fenced off each end of the narrow passage-way between the loader and the building at the side of the road and so have prevented access by the respondent to the dangerous gearing. This might no doubt have avoided or prevented the accident, but it would not have avoided or prevented a breach of the statutory duty to keep the gearing securely fenced. The gearing would have remained unprotected and a danger to the engineer or any one else who had to be beside the machine inside the fenced-off passage-way. It is one thing to fence off access to a machine and another thing to fence securely a dangerous part of the machine. If you prevent any one from going near a machine then of course you prevent the possibility of any one being injured by it. But employees must have access to machines to attend to them, and the statute requires any dangerous parts to be guarded for the very purpose of protecting from injury those who have access to them. I find myself in entire agreement with Lord Morison when he says: "Cutting off access to "a machine is, in my opinion, quite a different operation "from fencing the dangerous parts of a machine within the "meaning of s. 55."

I desire to emphasize that the present action is laid solely on the breach by the appellants of their statutory duty, under s. 55 of the Act of 1911, which breach they have shown that it was not reasonably practicable for them to have avoided or prevented. I reserve my opinion on the question whether, apart from the statute, the appellants had any duty, while

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H. L.(Sc.) the machine was in a dangerously unfenced state, to take such
1937 precautions as are suggested in the judgment under review
COLTNESS to prevent access to it by employees other than those who
IRON CO. had a duty to attend to it.
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SHARP. I move your Lordships to allow the appeal, to reverse the
Lord Macmillan. interlocutors of the Lord Ordinary and the First Division of
the Court of Session, to direct that the appellants be assoilzied
from the conclusions of the summons, and to find the appellants
entitled to their costs of the appeal and to their expenses in
the Court of Session.

LORD WRIGHT. I agree and have nothing to add.

LORD MAUGHAM. I concur in the proposed motion.

Appeal allowed.

Solicitors for appellants: *Beveridge & Co., for W. & J. Burness, W.S., Edinburgh, and J. A. McAra, Glasgow.*

Solicitors for respondent: *Herbert Z. Deane & Co., for I. H. Irvine-Jones, S.S.C., Edinburgh, and William Philp, Kirkcaldy.*

[HOUSE OF LORDS.]

ROWELL	APPELLANT ;	H. L. (E.)*
	AND	1937
PRATT	RESPONDENT.	June 11, 14 ; July 26.

Discovery—Privilege—Disclosure prohibited—Return to Potato Marketing Board—New trial—Substantial wrong or miscarriage of justice—Leave to appeal—Conditions—Agricultural Marketing Act, 1931 (21 & 22 Geo. 5, c. 42), ss. 1, 5, 17, sub-s. 2.

A return made by a grower of potatoes to the Potato Marketing Board set up under the Agricultural Marketing Act, 1931, is privileged from production in all legal proceedings other than those specifically mentioned in the proviso to s. 17, sub-s. 2, of the Act—namely, “ legal proceedings (including arbitrations) under “ this Act or any scheme made thereunder, or for the purpose of “ any report of such proceedings, or in so far as the disclosure is “ required or authorised by this Act, or any scheme made there- “ under.”

Per Lord Maugham: If a litigant is unable to secure the production at the trial of a document in the hands of a third party who has no just excuse for withholding it, that alone is not a ground for holding that a substantial wrong or miscarriage of justice has been occasioned, or for ordering a new trial. Such a litigant is in no better position to demand a new trial than one who failed to secure the attendance on subpoena of a witness, the other party to the litigation being in no way responsible for the failure.

Observations as to the terms imposed by the Court of Appeal for granting leave to appeal to the House of Lords.

Decision of Court of Appeal [1936] 2 K. B. 226 reversed.

APPEAL from a decision of the Court of Appeal. (1)

The plaintiff, the present appellant, sued in Wisbech County Court for the price of potatoes delivered by him to the defendant. The defendant counterclaimed damages, alleging that the plaintiff, in breach of his contract with the defendant, had delivered to other buyers potatoes which under the agreement should have been delivered to him. At the trial the main issue was whether the plaintiff had planted a particular kind of potatoes in a certain field on his farm in addition to those of

(1) [1936] 2 K. B. 226.

* *Present*: LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

H. L. (E.) the same kind planted in the area referred to in the agreement between the parties. In support of his allegation, the defendant wished to have produced a return made by the plaintiff to the Potato Marketing Board as required by the Agricultural Marketing Act, 1931 (1), in order to show the total acreage of potatoes planted in the plaintiff's various fields. Accordingly the defendant subpoenaed the Potato Marketing Board to produce the return, and an official attended with it, but claimed that it was privileged from production under the Act. The county court judge held that the return was privileged from production and gave judgment for the plaintiff, holding on the evidence given before him that the potatoes which were delivered to other buyers were grown in a field not included in the agreement with the defendant.

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On appeal the Court of Appeal—Greer, Slesser and Greene L.JJ. (Greer L.J. dissenting)—held that the Potato Marketing Board set up by the Act of 1931 was not a Government department, and that a return to that Board by a grower was not privileged from production in legal proceedings by virtue of s. 17, sub-s. 2, of the Act. The Court accordingly ordered a new trial of the action.

The plaintiff appealed to this House.

John Morris K.C. and *Gerald Gardiner* for the appellant. The return in question is clearly protected from production by virtue of s. 17 of the Agricultural Marketing Act, 1931, and it is easily explicable why it should be so—namely, in order to gain

(1) Agricultural Marketing Act, 1931, s. 17, sub-s. 2: "Any person who discloses any information obtained by him in the exercise of any power conferred on him by or under the provisions of this Act relating to polls, or in the exercise of any power conferred by or under this Act on any board, consumers' committee . . . shall be liable on conviction on indictment to imprisonment . . . or a fine . . . or to both . . . or on summary conviction to

" imprisonment . . . or to a fine . . . or to both
 " Provided that nothing in this section shall apply to the disclosure of any information in so far as it is required to be disclosed for the purposes of legal proceedings (including arbitrations) under this Act or any scheme made thereunder, or for the purpose of any report of such proceedings, or in so far as the disclosure is required or authorised by this Act, or any scheme made thereunder."

the confidence of those in the industry, and to ensure that the information contained in the return should not be disclosed to competitors in the industry. Furthermore, sub-s. 2 of s. 17, by enabling returns to be disclosed for the purpose of proceedings under the Act, has obviously excluded their disclosure in other cases. Similar provisions are contained in other recent Acts: for example, the Coal Mines Act, 1930, s. 8, and the Import Duties Act, 1932, ss. 9, 10. In any view there has been no miscarriage of justice, as the finding of the county court judge was based on evidence which was overwhelmingly in favour of the view taken by him.

Pritt K.C. and *S. L. Elborne* for the respondent. Two principles are to be borne in mind in the construction of this section, first, the importance of seeing that the general power of the Court to require the production of all the relevant evidence affecting the question in dispute should not be lightly cut down, and secondly, the rule that statutory exemptions do not override the general law further than is appropriate to the particular exemption. We submit that the language of s. 17, sub-s. 2, is not wide enough to override the above stated general rule. What is intended by the sub-section is that the contents of a return made to the Board shall not be disclosed by members of its staff. In *Lee v. Birrell* (1) Lord Ellenborough construed the oath taken by a collector of property tax that he would not disclose anything he learned in his official capacity except with consent or by virtue of an Act of Parliament as not excusing him from the obligation, when subpoenaed as a witness, to give evidence of all facts within his knowledge as to the collection of the tax.

[*LORD MAUGHAM.* In *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.* (2) it was said that the protection of certain classes of documents from discovery is upon the broad ground of State policy, and that the protection is not limited to public official documents of a political or administrative character, the foundation of the rule being that certain information cannot be disclosed without injury to the public interest.]

(1) (1813) 3 Camp. 337.

(2) [1916] 1 K. B. 822.

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In this case it cannot be said that public interest is involved, the Potato Marketing Board not being a Government department. The proviso to s. 17 merely prohibits the information contained in a return being disclosed to other persons ; it is not dealing with the question of its production in legal proceedings. When such production is intended to be forbidden, apt language is used for the purpose : see for example the Bankers Books Evidence Act, 1879, s. 6. There is no such clear exclusion of a return from production in this Act. The Court of Appeal was therefore right in ordering a new trial.

The House took time for consideration.

1937. July 26. LORD ATKIN. My Lords, I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends Lord Wright and Lord Maugham. I entirely agree with them, and they so completely cover the ground that, though we are differing from the Court of Appeal, I find it unnecessary to express the same reasons in different words.

LORD THANKERTON. My Lords, I also concur in the opinions about to be delivered by my noble and learned friends.

LORD MACMILLAN. My Lords, I also concur.

LORD WRIGHT. My Lords, I have had the advantage of reading in print the opinion prepared and about to be delivered by my noble and learned friend Lord Maugham in this appeal. I completely concur in that opinion. The few observations I now add relate merely to the principles which should in my opinion be followed in construing the material section, that is, s. 17, of the Agricultural Marketing Act. It is inevitable that a Court of law should approach in a critical spirit any legislation which is calculated to impede a Court in the discharge of its duty to administer justice by preventing it from obtaining any material evidence of a nature likely to assist it to ascertain the truth. Hence a Court will be disposed, as was the majority

of the Court of Appeal, to construe the section, if possible, so as to avoid that result. Now it is true that if the words of an enactment are fairly capable of two interpretations, one of which seems to be in harmony with what is just, reasonable and convenient, while the other is not, the Court will prefer the former. But if the words properly construed admit of only one meaning, the Court is not entitled to deny to the words that meaning, merely because the Court feels that the result is not in accordance with the ordinary policy of the law or with what seems to be reasonable. The Court cannot mould or control the language. This is particularly true of legislation in these days, when Parliament has established so many new institutions and bodies, and has imposed on individuals so many duties and disabilities for which in the former law no precedents can be found. A statute must be construed as a whole and with some regard to its apparent purpose and object. The language of one part may help to interpret the language of another. On the other hand, it is seldom that the construction of one statute can be determined by comparison with other statutes. Apart from some general rules of construction, each statute, like each contract, must be interpreted on its own merits.

For myself, I find the language of s. 17, sub-s. 2, clear and unambiguous, and not even difficult when read as a whole. It is curious that the sub-section does not contain an express prohibition, but a prohibition of an act must be implied when the act is made a criminal offence, punishable by fine or imprisonment or both. This prohibition is quite unqualified. It is not necessary to determine whether the first paragraph, if it stood alone, would require a judge to refuse to order any person by whom information of the character described has been obtained, to disclose that information in Court, because in my opinion the matter is put beyond doubt by the saving paragraph which follows. That paragraph falls into two parts, an exception and then a limitation upon that exception. The exception relates to disclosures so far as required for the purposes of legal proceedings. If the paragraph stopped there, that exception would have covered the present case. But the

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H. L. (E.) superimposed limitation is fatal to that view. The exception
 1937 is limited by the superimposed limitation to legal proceedings
 ROWELL under or in virtue of the Act. It is only within these narrow
 v. limits that the information may be disclosed. The present
 PRATT. case seems to me to fall outside the precisely expressed limits
 Lord Wright. of the proviso, and the proviso removes any doubt there might
 be whether the main prohibition applies to disclosure for the
 purposes of legal proceedings. A judge cannot compel a
 man to commit a criminal offence. I need not consider
 if the objection could be cleared by the interested party's
 consent.

I cannot construe the words "for the purposes of legal proceedings" in a restricted sense which would cover only matters anterior to the proceedings in open Court or in the actual hearing of the arbitration, but would exclude from their scope proceedings in open Court or arbitration. The words "for the purposes of legal proceedings" are wider than "in legal proceedings." But in any case only legal proceedings under the Act come within the liberty.

I do not agree that there is any rule of construction or any prima facie implication which makes it necessary to have express words to prohibit a person from producing a document or giving oral testimony if ordered to do so by a Court in legal proceedings. But perhaps it is more accurate to say that here the actual language can only be construed as covering such a case.

In the Act in question, like other Acts of a similar character, an individual is required by law to disclose to the proper person or body certain information as to his private affairs. The Act proceeds to secure to him that this information shall be kept secret, save only in the one specially defined circumstance. So regarded, the provision is, in addition to being unambiguous, quite reasonable.

On the further question, now become hypothetical, whether if the judge's order had appeared to be wrong, the case was one in which the Court should exercise its discretion to order a new trial, I do not attempt to add anything to the opinion of Lord Maugham.

LORD MAUGHAM. My Lords, this appeal is from an order of the Court of Appeal setting aside a judgment in favour of the respondent after trial of an action and counterclaim in the County Court of Cambridgeshire. The learned county court judge gave judgment with costs for the plaintiff Rowell in the sum of 97*l.* 12*s.* 10*d.* and dismissed with costs a counterclaim which had been limited to 100*l.* On appeal the Court of Appeal (Greer L.J. dissenting) set aside the judgment on the counterclaim and directed a new trial, the costs of the appeal to be paid by the plaintiff. Leave to appeal to this House was given on the unusual terms that the plaintiff should obtain from the National Farmers' Union an undertaking to pay the costs of the appeal as between party and party of both parties.

My Lords, the appellant, the plaintiff in the action and defendant in the counterclaim, is a farmer carrying on business at Inkerson Fen, near Sutton St. Edmunds. He is a grower of potatoes. The respondent is a Wisbech merchant and he is also a grower of seed potatoes. By agreements dated January 6, 1934, and March 31, 1934, the appellant contracted to grow for the respondent 9½ acres of royal kidney potatoes, sufficient seed for the purpose being supplied free of charge by the respondent. The potatoes were to be paid for by the respondent at the price of 50*s.* per ton delivered. The appellant in pursuance of the agreements delivered to the respondent 74 tons 14 cwt. 2 qrs. and 20 lbs. of royal kidney potatoes. He sued for the balance of the purchase price, and this claim was admitted by the defence. The respondent, however, alleged in his counterclaim that in breach of contract the appellant had not delivered to the respondent the whole product of the 9½ acres, but had sold to certain other merchants some 43 tons of potatoes belonging to the respondent from the 9½ acres. He counterclaimed for the value of these potatoes 131*l.* 18*s.* 3*d.*, a sum reduced to 100*l.* on the action being remitted to the county court. The appellant denied that the potatoes which he had sold to other merchants were the produce of the 9½ acres. The sole issue, as it was developed on the trial of the counterclaim, was whether or not the appellant had planted royal kidney potatoes in a field (called

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H. L. (E.) at the trial "field A") on his farm in addition to those admittedly planted on approximately $9\frac{1}{2}$ acres on a field called "field C."

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The action was heard in the county court before His Honour Judge Farrant on July 23, August 20 and 21, and November 19, 1935. The respondent called certain witnesses in an effort to prove that no royal kidney potatoes at all were planted in field A, and that the royal kidney potatoes admittedly sold to other merchants were his. He sought to support this evidence by an endeavour to obtain the production on summons of a return made by the appellant under an Order made pursuant to the Agricultural Marketing Act, 1931. His failure to obtain this document is the sole ground on which the Court of Appeal have based their order for a new trial. It will be necessary, therefore, carefully to state the facts as to this attempt. In the absence of the document the learned judge felt no difficulty on the evidence before him in believing a number of witnesses for the appellant and discrediting some witnesses for the respondent. He found as a fact that the appellant, as he had alleged, did plant about four acres of royal kidney potatoes in field A apart from those which were planted in field C; and he further found that the appellant delivered to the respondent all the royal kidney potatoes which were the produce of approximately $9\frac{1}{2}$ acres of land in field C, in compliance with the terms of the two contracts entered into between the appellant and the respondent. The amount so delivered worked out at about 8 tons per acre, which he found was a fair average yield in the circumstances which had existed. Lastly, he found as regards the sale of certain royal kidney potatoes to some other merchants that these represented the produce of the four acres planted in field A and that they formed no part of the crop of royal kidneys planted in field C. There being no appeal on fact, these findings would be amply sufficient to put an end to the litigation but for the circumstance already referred to as to the return made by the appellant to the Potato Marketing Board, which must now be stated.

My Lords, the Agricultural Marketing Act, 1931, provides (s. 1) for schemes regulating the marketing of agricultural

products by the producers which must be submitted to the Minister of Agriculture and Fisheries and in effect be approved by him and both Houses of Parliament, whereupon the Minister is to make an Order approving the scheme.

By s. 2, every scheme shall provide for the registration of any producer who makes application for that purpose, and shall constitute a Board to administer the scheme.

Sect. 5 states that a scheme (amongst other things) may provide for requiring registered producers to furnish to the Board such estimates, returns, amounts and other information relating to the regulated product as the Board consider necessary for the operation of the scheme.

Sect. 17 of the Act is in the following terms : " 17.—(1.) No "information with respect to any particular undertaking " (other than the undertaking of a board) shall, without the "consent of the owner of that undertaking, be included in any "report laid before Parliament in pursuance of this Act or "in any recommendations of an Agricultural Marketing Re- "organisation Commission published in pursuance of this Act.

"(2.) Any person who discloses any information obtained "by him in the exercise of any power conferred on him by or "under the provisions of this Act relating to polls, or in the "exercise of any power conferred by or under this Act on any "board, consumers' committee, committee of investigation, or "Agricultural Marketing Reorganisation Commission, shall be "liable on conviction on indictment to imprisonment for a "term not exceeding two years or a fine not exceeding one "hundred pounds or to both such imprisonment and fine, or "on summary conviction to imprisonment for a term not ex- "ceeding three months or to a fine not exceeding fifty pounds "or to both such imprisonment and fine :

"Provided that nothing in this section shall apply to the "disclosure of any information in so far as it is required to be "disclosed for the purposes of legal proceedings (including "arbitrations) under this Act or any scheme made thereunder, "or for the purpose of any report of such proceedings, or in "so far as the disclosure is required or authorised by this Act, "or any scheme made thereunder."

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H. L. (E.) By the Potato Marketing Scheme (Approved) Order, 1933,
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 ROWELL a scheme was approved under the Act for regulating the
 v. marketing of potatoes in Great Britain. By the scheme so
 PRATT. approved the Potato Marketing Board was constituted as a
 Lord Maugham. body corporate with a common seal and power to hold land
 without licence in mortmain.

By para. 76 of the scheme the Board was empowered, when they considered it necessary for the operation of the scheme so to do, to serve on any registered producer a demand in writing requiring him to furnish to them such estimates, returns and other information relating to potatoes as might be specified in the demand. There was a penalty for failure to comply with any demand or requirement made by the Board or making a false statement.

Information was required from registered producers, including the appellant, by the Board in due course ; and the appellant made a return in the prescribed form, but kept no copy of it. The form of return required each producer to state the acreage planted by him with each variety of potatoes, including, of course, royal kidney potatoes. It is plain that the return might have shown that the acreage figure in respect of royal kidney potatoes was only $9\frac{1}{2}$ acres, a statement consistent with the respondent's contention and one which would have been fatal to the appellant's case unless he could satisfy the judge that it was inserted by a mistake. The respondent's solicitor had accordingly served on the Registrar of the Potato Marketing Board a writing (described in the proceedings as a subpoena duces tecum) requiring the Board to produce to the Court the appellant's returns of the acreage and variety of potatoes he had planted on his said farm. John Workington Eyres, the Registrar of the Board, duly appeared at the trial with the documents named in the said subpoena duces tecum. Mr. Charles Greenwood, a solicitor of Wisbech, instructed on behalf of the said Board, was allowed to be heard, and objected to producing the documents, and he referred to s. 17 of the Act. Mr. Eyres was called. Cross-examined by counsel for the respondent he said that the Board was perfectly willing to disclose the documents with the consent of the plaintiff.

They had not asked the plaintiff for his consent. Counsel for the appellant interposed a little later to state that his client had never been asked to give his consent, and he added that the Board ought not to base their refusal to disclose the return, if at all, on the basis of there being no consent on the part of his client, the maker of the return. A surprising circumstance is that, upon these statements being made, counsel for the appellant was not asked then and there whether he would consent to Mr. Eyres producing the document or at least handing it to the judge for his perusal. In the result the learned judge, according to his note, held that the document was "privileged and need not be produced."

It should be added that, when the appellant went into the box and was cross-examined, the matter of the return was again referred to. According to the careful note kept by the learned judge, the cross-examination began as follows: "I understand the report is confidential. I have no objection to its being shown to the Court. I have all along been of that opinion. I was never asked for this for the purpose of settling this dispute. My solicitor did not tell me that the case would be settled if this report was produced." The return at this time was apparently not in Court, for Mr. Eyres had returned to London; but it is manifest, from what took place when Mr. Eyres was called on his subpœna, taken together with this statement by the appellant, that the non-production of the return was not the appellant's fault. Nor could he be sure when he stated that he had no objection to the report being shown to the Court that there would not be an adjournment to enable that to be done. It should be noted that the appellant's words are "shown to the Court." It is possible that he would have objected to the return being shown to the respondent.

My Lords, it should be mentioned here that the instrument described as a subpœna duces tecum was not in the form or of the nature of the writ properly called a subpœna the antiquity and compulsory effect of which is described by Lord Ellenborough in the case of *Amey v. Long*. (1) It was

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H. L. (E.) in truth only a summons issued pursuant to s. 110 of the County Courts Act, 1888, and Order 18, r. 3, of the County Court Rules, 1903-1935. (See now s. 109 of the County Courts Act, 1934, and Order 20, r. 8, of the County Courts Rules, 1936.)

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Under s. 111 of the Act of 1888 the penalty for refusing or neglecting "without sufficient cause" to produce the document is a fine not exceeding 10*l.*, and the fine may be applied in the discretion of the judge towards indemnifying the party injured by such refusal or neglect. It is not unimportant to observe that there is no power to attach the person served with the summons who refuses to produce the document, and if the Registrar of the Potato Board had been advised to raise the legal question before the High Court on another occasion and therefore to refuse production, he would have been quit on payment of the fine. The position of a party to an action who refuses to produce a relevant and non-privileged document in his possession was and is very different. (See Order 16, r. 21, of Rules of 1903-1935.)

My Lords, the first point that arises for decision is whether having regard to the terms of s. 17 of the Agricultural Marketing Act the learned judge acted rightly in refusing to order the production of the return. I do not think the question can accurately be stated as being whether the return was a document privileged from production. The document was the property of third parties, namely, the Potato Board, and they were not objecting to produce the return in their own interest but simply and solely because they thought s. 17 involved a statutory prohibition as regards production. The question then arose whether there was in the language of s. 111 of the County Courts Act, 1888, "sufficient cause" for the refusal. This is, I think, equivalent to the "lawful or "reasonable excuse" which would exist in the case of a subpœna duces tecum issued in High Court proceedings, and the Court alone would be the judge there of the validity of the excuse: see *Amey v. Long*. (1) The excuse need not be limited to a claim of privilege; and in my opinion a county

court judge is not compelled to fine a third party who is in his view acting reasonably in the matter. H. L. (E.)

My Lords, before considering the language of s. 17 it may be useful to remark that the Legislature has in several modern statutes required elaborate returns to be made by farmers and others either to a department of State or to a board charged with duties of a public character, and the Act has in several cases contained a provision either identical with or at least resembling the section which now has to be construed. There are now separate marketing boards relating to bacon, hops, milk and pigs as well as potatoes. The true construction and effect of the section is, therefore, a matter of considerable importance.

The reason for such a provision in a marketing scheme is obvious—namely, that farmers and other producers as a class are so reluctant to disclose the details of their business that such a scheme would have poor prospects of being brought into successful operation unless they were given an assurance that the information contained in the estimates, returns, accounts and so forth furnished by them would not be divulged to rivals or competitors. It is true, as pointed out in the Court of Appeal, that the Potato Marketing Board is not a department of State, but is merely a domestic executive body which the Legislature has thought fit in the public interest to entrust with important statutory powers. The excuse of the Board for not willingly producing the return must, therefore, rest on s. 17; but in my opinion it is not a correct proposition to say that there is a presumption that the secrecy attaching to such a return is not intended to be applicable if its production is called for in a legal proceeding unless the Legislature has in plain language declared the contrary. In my judgment the matter is one to be decided without any presumption either way. The reasons for secrecy in such a case are, I think, almost equally cogent whether the production of a return is demanded for some collateral purpose in an action or whether the information is sought for out of Court.

My Lords, if the matter is so approached, I find myself with the greatest respect unable to agree with the judgments of Slessor L.J. and Greene L.J. It is not unimportant to note

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H. L. (E.) that sub-s. 1 of s. 17 prohibits the use of any information with respect to any undertaking without the consent of the owner, even in a report laid before Parliament in pursuance of the Act. I do not think it can be doubted that the first part of sub-s. 2 impliedly prohibits the disclosure of any information such as that contained in a return, for there are few better ways of prohibiting an act than by making the doer of it liable to fine and imprisonment. The only question is whether the prohibition applies to ordinary legal proceedings.

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It does not seem to me necessary to say what the answer to this question would have been in the absence of the proviso ; for, I think, the proviso, limited as it is to legal proceedings "under the Act," is decisive in the matter. I am quite unable to take the view that the proviso relates only to disclosure to solicitors and counsel employed in proceedings under the Act. In my opinion it plainly relates to any disclosure for the purposes of legal proceedings under the Act, the most important of all being the statement of the facts on oath and the production of the returns at the trial. It may be noted that the proviso goes on to authorize a report of such proceedings, meaning plainly a report of the information disclosed at the trial. There could not be a reason for this part of the proviso if the information could always lawfully be disclosed at any trial in open Court. The proviso in my view according to its true construction makes an exception for any information required to be disclosed for the purposes of legal proceedings under the Act ; and it accordingly follows that there is no exception for information which a litigant may desire to have disclosed for the purposes of legal proceedings not under the Act. I should add with all respect that the words "for the purposes of" the proceedings were on this view of the section perfectly appropriate. The draftsman was desirous of limiting the disclosure to the information "required to be disclosed . . . for the purpose of" the proceedings. Similar words are used in the sentence "or for the purpose of any report of such proceedings" ; and I am unable to see any sufficient reason for limiting the words in the way suggested. I agree on the point as to the construction

of s. 17 with the opinion expressed by Greer L.J. and with the reasons he has given in support of it ; and I think the county court judge was right in declining to order the Registrar of the Potato Board to produce the return.

My Lords, the conclusion above stated is sufficient to dispose of this appeal, but a second point has been elaborately argued, and it would not be right, I think, for your Lordships to be silent upon it. Assuming, contrary to the view above expressed, that the county court judge was wrong in refusing to order production of the return, would that circumstance alone have been a sufficient ground for ordering a new trial ? This question is one of considerable importance. Greer L.J. was for answering the question in the negative, while Slessor L.J. and Greene L.J. took the other view.

My Lords, it is in my opinion clear that according to the modern practice no new trial should be granted because of the refusal of the judge to order production of a document in the hands of a third party unless "some substantial wrong or "miscarriage of justice has been thereby occasioned." It is true that this is not a case precisely within the terms of Order xxxix., r. 6, of the R. S. C. since the stage of rejecting the evidence contained in the return had not been reached. The production of the return would not make it evidence ; it was for counsel for the respondent to decide after its production to put it in evidence subject to any objection. But there can, I think, be no doubt that the rule must be held to apply by way of analogy to such a case as the present ; and it was necessary for the respondent when applying for a new trial to establish that there had been a substantial wrong or miscarriage.

Two circumstances should be borne in mind—first, that the appellant was in no way to blame for the non-production of the return, and, secondly, that so far from there being any evidence, presumptive or otherwise, leading to the conclusion that the return would have assisted the respondent's case, the evidence is the other way. True it is that the return might have contained statements which would have been admissible in evidence as admissions against the appellant, and in that case the respondent's counsel would doubtless have put the

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H. L. (E.) document in. But why is the Court to assume in the complete
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 absence of evidence, and one may add in spite of the evidence, that the document contained such statements? If the appellant was an honest man and had made a proper return, the document was useless to the respondent, and not properly admissible in evidence. It may be added that counsel for the respondent abstained, and one may conjecture deliberately abstained, from suggesting that, the appellant not objecting, the learned judge should himself look at the return.

My Lords, no case has been discovered, at least none has been cited, supporting the view that if a litigant is unable to secure the production at the trial of a document in the hands of a third party who has no just excuse for withholding it, that alone is a ground for holding that some substantial wrong or miscarriage of justice has been occasioned and for directing a new trial. Such a litigant is in no better position to demand a new trial than one who fails to secure the attendance on subpoena of a witness, the other party to the litigation not being in any way responsible for the failure. The remedy of such a litigant in the High Court is not by way of new trial, but by action against the witness who has failed to obey the subpoena; but there the litigant could doubtless get production of the document by means of the great powers of the Court. As we have seen, in the county court there was no certain way of procuring production of the return.

Moreover, in the case we have to deal with it was, in my opinion, not possible to establish that some substantial wrong or miscarriage of justice had been occasioned unless *prima facie* evidence could be given to show that the return in fact contains statements such as the respondent imagines to exist in it. I am unable to see for the present purpose any substantial difference as regards a claim to a new trial between the present case and that of a litigant who seeks a new trial on the ground that he has discovered since the trial some fresh evidence. In such a case it is not sufficient to show that the new evidence exists and is relevant to the issue; he must establish that the evidence is *prima facie* likely to be believed and if believed would, if not conclusive, at least form a determining factor

in the result : see *Brown v. Dean* (1) ; *Hip Foong Hong v. H. L. (E.)*
H. Neotia & Co. (2) In the present case there is no ground for
 supposing that the document would be admissible in evidence
 at all, and if that is the case a new trial would be useless, as
 well as being a gross hardship on the appellant. On this point
 also I have arrived at the same conclusion as Greer L.J.

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My Lords, I am of opinion for the reasons above stated that the appeal succeeds and that the judgment of the learned county court judge should be restored with costs in the county court and in the Court of Appeal.

A word must be said as to the terms on which leave to appeal to this House was granted. There are doubtless cases where leave to appeal should only be granted on the terms that the appellant agrees to pay the costs of the respondent in any event; but it may well be doubted whether that is right in a case where the Court of Appeal by a majority is reversing the decision of the trial judge. If the matter had come before the Appeal Committee of this House, I think leave to appeal would probably have been granted without the imposition of such a term.

Appeal allowed.

Solicitors for appellant : *Metcalfe, Copeman & Pettefar.*

Solicitors for respondent : *Burton, Yeates & Hart, for Southwell, Dennis & Farrow, Wisbech.*

(1) [1910] A. C. 373.

(2) [1918] A. C. 888.

[HOUSE OF LORDS.]

H. L. (E.)* STROOD ESTATES COMPANY, LIMITED . APPELLANTS ;

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AND

June 25, 28 : GREGORY RESPONDENT.
July 26.

Landlord and tenant—Rent restriction—Increase of rent—Rates paid by landlord—Rates compounded—Permitted increases—"Net rent"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), ss. 2, 12.

Sect. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, permits the rents of dwelling-houses to which the Act applies to exceed the statutory "standard rent" (inter alia), where the landlord is responsible for the whole of the repairs, by an amount not exceeding twenty-five per cent. of the net rent; and by s. 12, sub-s. 1 (c), "The expression 'net rent' means, 'where the landlord at the time by reference to which the 'standard rent is calculated paid the rates chargeable on, or 'which but for the provisions of any Act would be chargeable 'on the occupier, the standard rent less the amount of such 'rates, and in any other case the standard rent' :—

Held, that, to arrive at the "net rent," the full rates chargeable on the occupier are to be deducted from the standard rent, and not the compounded rates in fact paid pursuant to certain Acts by the landlord in place of the occupier.

Nicholson v. Jackson (1921) 37 Times L. R. 887 distinguished. Decision of Court of Appeal [1936] 2 K. B. 605 affirmed.

APPEAL from a decision of the Court of Appeal. (1)

The Strood Estates Co., Ltd., let to Frederick Gregory a dwelling-house in Rochester on a weekly tenancy. The company were responsible for the whole of the repairs, and they paid the rates chargeable in respect of the house. The local authority granted to the company an allowance or abatement in respect of the rates, that is to say, the company paid a compounded rate in accordance with the Poor Rate, etc., Act, 1869, s. 4, and the Public Health Act, 1875, s. 211.

The standard rent of the house on August 3, 1914, was 5s. 6d. per week.

(1) [1936] 2 K. B. 605.

* *Present* : LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

The plaintiffs having substituted at the house a modern and efficient sanitary system for one of a more antiquated type, proposed to make increases in the rent under the Increase of Rent, etc. (Restrictions), Act, 1920, s. 2, sub-s. 1 (a), (c) and (d). (1) As to the increases under clauses (c) and (d), amounting together to 40 per cent. of the net rent, they contended that the deduction of rates to be made from the standard rent in order to arrive at the "net rent" on which these increases were to be calculated should be the compounded rates only which they in fact paid, and not the full amount of the rates as assessed.

As the defendant declined to pay the increased amount of rent the plaintiffs sued him in the county court claiming 3*l.* 2*s.* 11*d.* as arrears in respect of the increased amounts from September 16, 1935, to January 20, 1936.

The county court judge held that the plaintiffs were not bound to deduct more than the amount of the compounded rate from the standard rent and were entitled to base the increase of 40 per cent. upon the figure thus arrived at, and that the work done by the plaintiffs was an improvement and that they were entitled to an increase of rent in respect of it equal to 8 per cent. of their expenditure, and he gave judgment for the plaintiffs for the amount of their claim.

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2. :—

"(1.) The amount by which the "increased rent of a dwelling-house to which this Act applies "may exceed the standard rent "shall, subject to the provisions "of this Act, be as follows, that is "to say :—

"(c) In addition to any such "amounts as aforesaid, an amount "not exceeding fifteen per centum "of the net rent :

"(d) In further addition to any "such amounts as aforesaid— " (i.) where the landlord is respon- "sible for the whole of the repairs,

"an amount not exceeding twenty- "five per cent. of the net rent ; "

Sect. 12 : " (1.) For the purposes "of this Act, except where the "context otherwise requires :— "

"(c) The expression ' net rent ' "means, where the landlord at "the time by reference to which "the standard rent is calculated "paid the rates chargeable on, or "which but for the provisions of "any Act would be chargeable on "the occupier, the standard rent "less the amount of such rates, "and in any other case the "standard rent."

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H. L. (E.) The defendant (the tenant) appealed.

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The Court of Appeal (Sir Boyd Merriman P., Scott L.J., and Eve J.) held that where, as in this case, the landlords, under the provisions of the Poor Rate Assessment and Collection Act, 1869, and the Public Health Act, 1875, paid smaller, or compounded, rates, the "net rent" for the purposes of the Rent Act meant the standard rent less, not the compounded rates, but the full rates; and consequently that the permissible increase was on the standard rent less the full rates which, if payable by the tenant, would have been paid by him.

The plaintiffs appealed to this House.

Linton Thorp K.C., Donald McIntyre and Eric V. Falk for the appellants. The question is whether where the landlord pays the rates there should be deducted from the standard rent in order to arrive at the "net rent" (a) the amount actually paid by the landlord to the local authorities, or (b) the amount which the occupier would have to pay in rates if he himself paid them. We submit that the test is what the landlord in fact pays, not what the occupier would have paid if he had been directly rated.

[LORD THANKERTON. It seems to me that the word "paid" in the section must mean "liable to pay."]

If that had been the intention of Parliament it would have been quite easy to have said "is liable to pay." The view for which we contend is supported by the opinion of Lord Cave in *Nicholson v. Jackson*. (1) The language of the section may be open to different interpretations, but that which is the most reasonable should be adopted—namely, that which takes into account the actual amount which the landlord in fact paid.

Thomas F. Southall and J. D. Walker for the respondent were not called upon.

The House took time for consideration.

1937. July 26. LORD ATKIN. My Lords, at the conclusion of the arguments in this case I came to the conclusion that

(1) (1921) 37 Times L. R. 887, 889.

the decision of the Court of Appeal was right, and that the reasons that they gave for that decision were correct. I have now had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Macmillan affirming that decision with which I entirely agree, and I have nothing to add.

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LORD THANKERTON. My Lords, I also desire to express my concurrence in the opinion about to be delivered by my noble and learned friend Lord Macmillan.

LORD MACMILLAN. My Lords, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by s. 2, sub-s. 1, permits the rents of dwelling-houses to which the Act applies to exceed the statutory "standard rent" (inter alia) (c) by an amount not exceeding fifteen per cent. of the "net rent," and (d), where the landlord is responsible for the whole of the repairs, by a further amount not exceeding twenty-five per cent. of the "net rent."

"Net rent" is defined by s. 12, sub-s. 1 (c), of the Act as follows:—"The expression 'net rent' means, where the 'landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which 'but for the provisions of any Act would be chargeable on 'the occupier, the standard rent less the amount of such 'rates, and in any other case the standard rent.'" The question at issue in this appeal is whether, in cases where the landlord at the relevant time paid the rates, there should be deducted from the standard rent to arrive at the "net rent"—(a) the amount actually paid by the landlord to the appropriate local authorities; or (b) the amount which the occupier would have had to pay to the local authorities if he had himself had to pay the rates.

The difference between (a) and (b) arises in consequence of the provisions of the statutes under which the rates were levied. These statutes are the Poor Rate Assessment and Collection Act, 1869, and the Public Health Act, 1875.

By s. 4 of the Act of 1869 the vestry of any parish may

H. L. (E.) order that the owners of all rateable hereditaments whose
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 GREGORY. force "The overseers shall rate the owners instead of the
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 "of fifteen per centum from the amount of the rate"; if
 the owner notifies that he is willing to be rated in respect of
 his rateable hereditaments whether the same be occupied
 or not, the overseers are required to rate him accordingly
 and to allow him a further abatement or deduction not
 exceeding fifteen per cent.

Sect. 211 of the Act of 1875 directs that general district rates shall be made and levied on the occupier of all kinds of property for the time being assessable to any rate for the relief of the poor, but "The owner, instead of the occupier, "may at the option of the urban authority be rated" in cases where the rateable value does not exceed 10*l.*, or where the premises are let to weekly or monthly tenants, or where the premises are let in separate apartments or the rents become payable or are collected at any shorter period than quarterly: "Provided that in cases where the owner is rated "instead of the occupier he shall be assessed on such reduced "estimate as the urban authority deem reasonable of the net "annual value, not being less than two-thirds nor more than "four-fifths of the net annual value; and where such reduced "estimate is in respect of tenements whether occupied or "unoccupied, then such assessments may be made on one-half "of the amount at which such tenements would be liable to "be rated if the same were occupied and the rate were levied "on the occupiers."

Thus under these statutes where the rates were paid by the landlord he was entitled in the case of the poor rate to a percentage "abatement or deduction" from the amount of the rate, and in the case of the general district rate to be assessed on a reduced estimate of the net annual value of his premises.

The respondent is in possession as a weekly tenant of a

dwelling-house at Strood belonging to the appellants. It is agreed that the standard rent of the premises is 5s. 6d.; and that at August 3, 1914, being "the time by reference "to which the standard rent is calculated," the appellants paid rates to the local authority in respect of the premises, in the case of the poor rate subject to the statutory abatement or deduction and in the case of the general district rate on a reduced estimate of the net annual value of the premises. The sum actually paid by the appellants in name of rates was 1s. 2¼d. per week; if the occupier had paid the rates, the sum charged on him would have been 1s. 6¼d. per week.

The "net rent" is thus either 5s. 6d. minus 1s. 2¼d. equals 4s. 3¾d., or 5s. 6d. minus 1s. 6¼d. equals 3s. 11¾d., according as one or other of the rival interpretations of the statutory definition of "net rent" prevails. The difference is 4d. a week. The appellants naturally contend for the larger figure, as the permitted 40 per cent. increase of rent is larger if the 40 per cent. is calculated on 4s. 3¾d. than if it is calculated on 3s. 11¾d.; the respondent equally naturally contends for the smaller figure.

The present proceedings originated in the county court, where the appellants sued the respondent for certain arrears of rent computed in conformity with their contention as to the proper mode of ascertaining the "net rent"; the respondent did not dispute liability for arrears computed according to his contention as to the proper mode of ascertaining the "net rent."

The learned county court judge found in favour of the appellants and gave judgment for 3l. 2s. 11d.; the Court of Appeal set aside this judgment, decided the question at issue in favour of the respondent and gave judgment accordingly for 2l. 12s. 10d.

The statutory definition of "net rent" is no doubt not very happily worded and lends itself to the verbal refinements which counsel for the appellants ingeniously elaborated. But for myself I find little difficulty in agreeing with the reading adopted by the Court of Appeal which seems to me to be the straightforward meaning of the language employed. The

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H. L. (E.) “ net rent ” is to be “ the standard rent less the amount of
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 v. but for the provisions of any Act. The rates chargeable on
 GREGORY. the occupier are the full rates on the net annual value of
 Lord Macmillan. the premises ; where the provisions of any Act place the
 burden of the rates on the landlord and grant him corresponding
 concessions then the rates “ which but for the provisions of
 “ any Act would be chargeable on the occupier ” are again
 the full rates. Therefore in either case to arrive at the
 “ net rent ” the full rates chargeable on the occupier are
 to be deducted from the standard rent.

But the appellants say that the true antecedent of “ such
 “ rates ” is not “ the rates chargeable on or which but for
 “ the provisions of any Act would be chargeable on the
 “ occupier ” but the rates actually paid by the landlord,
 i.e., the sums paid by him under abatement or on a diminished
 annual value, which were accepted from him by the local
 authority in discharge of his liability to pay the rates
 chargeable in respect of the premises. I cannot accept this
 reading. It is said that in point of fact the landlord did
 not at August 3, 1914, pay “ the rates chargeable on or which
 “ but for the provisions of any Act would be chargeable on
 “ the occupier,” if the words quoted mean the full occupier’s
 rates, for the landlord paid less sums than the occupier would
 have had to pay. Therefore, it is said, the reference must
 be to the sums actually paid by the landlord, for otherwise
 if the reference is to the full occupier’s rates, the present
 case would not be one in which the landlord paid the rates
 and the “ net rent ” would under the definition be the standard
 rent, for which neither party contends. To this the answer
 is that when the definition speaks of the landlord having paid
 the occupier’s rates it does not mean that he has paid the
 actual sum which the occupier would have paid as rates but
 that the landlord has paid in place of the occupier. The
 phrase is descriptive of the nature of the rates paid not of
 the amount paid in discharge of them. Thus when the
 definition speaks of “ such rates ” it does not refer to the

sums actually paid by the landlord but to the kind of rates in respect of which the landlord has paid—namely, occupier's rates. In my opinion it is the occupier's rates which have to be deducted not the rates assessed on the landlord or accepted by the local authority from the landlord in discharge of the rates. What is to be deducted is that which the occupier was or would have been (but for special legislation) liable in law to pay, not what the landlord in fact paid or was liable to pay in place of the occupier.

The only authority referred to was the case of *Nicholson v. Jackson* (1) in this House. But that case turned upon the materially different language of s. 1, sub-s. 1 (iv.), of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and is not of assistance in the solution of the present problem.

I accordingly move your Lordships to dismiss the appeal and affirm the judgment of the Court of Appeal. As regards the costs of the appeal the appellants were placed on special terms by the order of the Court of Appeal granting them leave to come to this House and the respondent will have his costs of the appeal except in so far as already paid to him or defrayed for him by the appellants in terms of the order of the Court of Appeal.

LORD WRIGHT. My Lords, I agree with the opinion which has just been delivered by my noble and learned friend Lord Macmillan.

LORD MAUGHAM. My Lords, I also agree.

Appeal dismissed.

Solicitors for appellants : *Simon, Haynes, Barlas & Ireland.*
Solicitor for respondent : *W. H. Thompson.*

(1) 37 Times L. R. 887.

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[HOUSE OF LORDS.]

H. L. (E.)* BLEE APPELLANT ;
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 AND
 Oct. 14, 18 ;
 Nov. 5. LONDON AND NORTH EASTERN } RESPONDENTS.
 RAILWAY COMPANY }

Workmen's Compensation—Accident “arising out of and in the course of the employment”—Workman injured in street when proceeding to work on being called out on emergency duty—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 1.

A ganger in the service of a railway company was, by the terms of his contract of service, liable to be called upon in case of emergency to go to the place where the emergency had arisen, notwithstanding that he might have finished his normal day's work, and when so called upon after his normal day's work he was entitled to be paid overtime from the hour he left his home in order to proceed to the place where the emergency had arisen. One night, after he had completed his day's work and after he had gone to bed, he received a message requiring him to go to a certain siding to assist in replacing a derailed truck, and in compliance with that order he rose and was proceeding to the siding when he was knocked down in the street by a motor car and sustained injuries from the effects of which he died. On a claim for compensation by his widow :—

Held, that as the deceased man was obliged by the terms of his contract to obey an emergency call at any hour, as he was paid from the time he left his home in obedience to the call, and as he was obliged to proceed with reasonable despatch to the place where his services were required, there was evidence to support the finding of the county court judge that the accident arose out of and in the course of the deceased man's employment, and, therefore, that his widow was entitled to compensation.

Decision of Court of Appeal reversed.

APPEAL from the Court of Appeal.

The appellant was the widow of Henry Blee, who was in the employment of the respondents as an acting ganger, his normal hours of work being from 7.20 A.M. to 5 P.M. It was a condition of his contract of employment that, when ordered to do so in case of emergency, he should proceed to the place where the emergency had arisen although he might

**Present* : LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD MAUGHAM, and LORD ROCHE.

have finished his normal work for the day. When so called out for emergency duty he was paid at overtime rate calculated from the time he left his home, with a minimum payment for two hours. On the night of January 25, 1935, a message was received from the respondents by Blee at his home, 25 Harringay Road, Hornsey, ordering him to go to the Hornsey siding to assist in replacing a derailed truck. Blee had already worked during the normal working hours on that day, and he was in fact in bed when he received the message, but in obedience thereto he rose from his bed and at 10.30 left his home to go to the siding, but while on his way there he was knocked down in the street by a motor car and sustained injuries from the effects of which he died on August 19, 1935. On a claim for compensation by the present appellant in respect of her husband's death, the county court judge held (a) that the death of the deceased was accelerated by the accident which happened to him on his way from his home to the siding; (b) that the deceased's employment with the respondents began when he left his home to go to the siding; and (c) that the accident arose out of and in the course of the deceased man's employment; and in accordance with these findings the county court judge made an award in favour of the appellant for 300*l*. On appeal by the present respondents the Court of Appeal (Slesser and Scott L.JJ. and Eve J.) reversed the decision of the county court judge, holding that the deceased man owed no duty under his contract of service beyond this, that he had agreed that when he was wanted in an emergency he should report as soon as conveniently might be at the employers' premises where the emergency had arisen and where he was required; and that how he reached those premises was entirely his own affair, his duty being at, and only starting when he reached, the employers' premises.

The widow appealed.

Lynskey K.C. and *Shakespeare* for the appellant. The fact that in this case the employers had the right to require the workman not only to do his ordinary work within the normal

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hours but could also require him to attend at any hour for emergency work, coupled with the fact that they agreed to pay him as from the time he left his home, were circumstances entitling the county court judge to hold that the workman was on duty from the time he left his home to carry out the express order to go to Hornsey station, and, therefore, that the accident happened in the course of his employment. When he received and obeyed the order, he immediately brought himself under the control of the employers, and this case comes within the principle of Lord Wrenbury's language in *St. Helens Colliery Co. v. Hewitson* (1), where he said: "If the workman is doing anything that his employer "could and did, expressly or by implication, employ him to "do or order him to do, and the accident occurs when he is "doing it, the case is within the Act. If, for instance, the "employer says 'Go by the 9.45 train to Manchester and "there do such and such a job' the employer is on the risk "directly the man goes, as he is ordered." Here the deceased man received an order to do something at this particular place, and it was in obeying that order that he met with the accident which resulted in his death. The fact that the risk which caused the accident was one shared by all members of the public using the streets is for this purpose immaterial: *Dennis v. White & Co.* (2) *Allen v. Siddons* (3), which was referred to in the Court of Appeal, has no application to this case inasmuch as there no special order was given to the workman which he was bound to obey. *Alderman v. Great Western Ry. Co.* (4), is also distinguishable on the same ground. [*London & North Eastern Ry. Co. v. Brentnall* (5), was also referred to.]

Sir Walter Monckton K.C. and *Beney* for the respondents. The question is, as was stated in *Sparey v. Bath Rural District Council* (6)—"whether the workman when he was injured "was in his capacity as an employee doing something

(1) [1924] A. C. 59, 92.

(4) [1937] A. C. 454.

(2) [1917] A. C. 479.

(5) [1933] A. C. 489.

(3) [1932] 25 B. W. C. C. 350.

(6) [1931] 24 B. W. C. C. 414, 427.

"referable to his employment or was in his capacity as a "citizen doing something independent of his employment." In the present case it is said for the appellant that but for the summons the deceased workman would have been in his bed ; but that was equally true at 7 A.M., when he had to rise in order to be able to reach his place of work at 7.20 A.M. There is no distinction to be made between a workman going to his work at the normal time and going to it at any other time. In each case he makes the journey because he has to reach his place of work, his duty being to present himself at the normal time or at the special time. There is a vital distinction between going to work and doing it when the place has been reached ; in each case it is the place of the employment, and not the route to it, which determines whether the employment has or has not begun. The mere fact that the deceased workman was paid as from the time he left his home is irrelevant for this purpose ; he was protected only when he reached the scene of his work. Just as was said in *Alderman v. Great Western Ry. Co.* (1), this workman was at the place of the accident merely because it lay on the route between his home and the place of the derailment ; his employment began only when he reached that place. *Newton v. Guest, Keen & Nettlefolds, Ltd.* (2) shows that no point can be made of the fact that the workman was adopting the only practicable means of reaching the place where he was to work.

Lynskey K.C. in reply. The test to be applied is that stated by Lord Atkinson in *St. Helens Colliery Co. v. Hewitson*, (3) where he said that "a workman is acting in the course of his "employment when he is engaged 'in doing something he was "employed to do.' Or what is, in other and I think better "words, in effect the same thing—namely, when he is doing "something in discharge of a duty to his employer, directly "or indirectly, imposed upon him by his contract of service." In this case the county court judge applied that test and his decision should be restored.

The House took time for consideration.

(1) [1937] A. C. 454, 460.

(3) [1924] A. C. 59, 71.

(2) (1926) 19 B. W. C. C. 119.

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1937. Nov. 5. LORD ATKIN. My Lords, this is an appeal in a workman's compensation case from an order of the Court of Appeal, who set aside an award by the late Judge McCleary, sitting at Clerkenwell, in favour of the widow of the workman. The deceased man was an acting ganger in the employ of the respondents; he was killed as the result of a street accident while proceeding to fulfil an emergency call on the railway, and the question is whether in the circumstances the accident arose out of and in the course of his employment. The learned arbitrator found that it did: the Court of Appeal thought that as a matter of law it did not. The facts, which were not in dispute, were that the deceased man was an acting ganger employed by the railway company with his headquarters at Hornsey station. He received a weekly wage of 63s.; and his normal hours were from 7.20 A.M. to 5 P.M. It was, however, a term of his contract that he might be ordered outside those hours to come to do emergency work on the railway. If he received such an order, he had to obey it; he received overtime varying with the time of the day or night, commencing from the time he left his home and calculated to the nearest quarter of an hour with a minimum of two hours. On the day in question the workman, having worked the usual time, had retired to bed; he received a message to go to Hornsey sidings, where some trucks had been derailed; he started out at 10.30 to get to the work and was run into by a car while on his way and received injuries from which he afterwards died. He never, in fact, reached the railway or any part of it.

There can be no question that had the workman been going to his ordinary work in the morning he would not have been entitled to compensation for injury suffered from street risks incurred in transit. His time in such a case is his own; he arrives at the scene of his labours as he pleases; and though it is his duty to present himself at the appointed time yet his "employment" does not in ordinary circumstances begin for the purposes of the Act until he reaches the place where he is employed. As Lord Dunedin said in *Davidson & Co. v.*

McRobb (1), in a passage aptly cited by my noble and learned friend Lord Russell of Killowen in *Alderman v. Great Western Ry. Co.* (2): "In my view 'in the course of employment' is a "different thing from 'during the period of employment.' It "connotes to my mind the idea that the workman or servant "is doing something which is part of his service to his employer "or master. No doubt it need not be actual work, but it "must, I think, be work or the natural incidents connected "with the class of work." Lord Atkinson in *St. Helens Colliery Co. v. Hewitson* (3) puts it, "A workman is acting in the course "of his employment . . . when he is doing something "in discharge of a duty to his employer, directly or indirectly, "imposed upon him by his contract of service." In *Newton v. Guest, Keen & Nettlefolds, Ltd.* (4), Lord Cave L.C., accepting the test laid down in *Hewitson* (3) determines the case by consideration of the fact "that when the accident happened [the man] "was on his way to his work by the means provided by his "employers but was in no sense actually engaged in the "performance of his contract of service." Finally, I would refer to the words of Lord Russell of Killowen in *Alderman's* case (5): "The cases in which men are employed to work at "a distance from their homes and have to find lodgings for "themselves must be innumerable. Yet there is no case in "the books, or at all events none was cited, in which such an "one meeting with an accident when merely on his way to or "from his work has been held entitled to compensation. In "order to entitle him to compensation in such a case some "other element must be present (involving the discharge of a "contractual duty to the employer) which in law extends "the course of his employment so as to include the moment "of time when the accident occurred."

In the present case, if the course of the employment had begun, there was no dispute that the injury by street risk was an injury by accident arising out of the employment. The messenger boy, the postman, the canvasser, employed to travel

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(2) [1937] A. C. 454, 459.

(3) [1924] A. C. 59, 71.

(4) (1926) 19 B. W. C. C. 119,
126.

(5) [1937] A. C. 461.

H. L. (E.) on the streets and injured in the course of the employment by an ordinary street risk are entitled to compensation and none the less that they are exposed to the risk in no higher degree than the ordinary wayfarer. The question is whether the employment had begun in the sense of the decisions I have cited. The respondents say that this is the ordinary case of a man making his way to his work. It matters not what the particular hours are. Normally he would have to present himself at 7.20 A.M. On emergency he has to present himself also at 8 P.M., 10 P.M. or whatever the emergency time may be. The contractual position remains the same. The employment does not begin until he has reached his work. On the other hand, the appellant says that whatever be the true result in other cases, in this case there was evidence upon which the judge could find that the workman was "doing something that was part of his service to his employer"; something "in discharge of a duty to his employer directly imposed upon him by his contract of service"; was "actually engaged in the performance of his contract of service"; was engaged "in the discharge of a contractual duty to the employer." In my opinion the case is not free from doubt; but I have come to the conclusion that there were special facts in this case in the special duty to obey the emergency call at any hour and the fact that the workman was paid from the time he left the house so that the time was his master's time and he was under an obligation to proceed with reasonable despatch by the reasonably shortest route, which afforded evidence from which the judge could infer that from the time the workman started from his house he was "actually engaged in the performance of his contract of service." It does not appear that the learned and very experienced arbitrator the late Judge McCleary in any way misdirected himself; and as there was evidence to support his finding I think it should stand. This decision has no general application to cases where workmen are employed to work at hours which differ from their normal hours of labour, though they are discontinuous. Any such case must be decided on its own facts. I move your Lordships that the order appealed from be reversed; that the

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award of the arbitrator be restored ; and that the appellant have the costs in the Court of Appeal and in this House.

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LORD RUSSELL OF KILLOWEN. My Lords, I have had an opportunity of reading and considering the opinion which has just been delivered and also the opinion of my noble and learned friend Lord Maugham. I agree and have nothing to add.

LORD MACMILLAN. My Lords, I also have had the same advantage as my noble and learned friend Lord Russell of Killowen and I concur.

LORD MAUGHAM. My Lords, I have had the advantage of reading the opinion which my learned and noble friend Lord Atkin has just expressed, and I fully agree with his conclusion and the reasons he has given in support of it. The respect which I entertain for the Lords Justices has led me to endeavour to express, very shortly in my own language, the grounds on which, in a difficult case, I have felt constrained to differ from the judgments which were delivered in the Court of Appeal.

My Lords, the facts found or admitted at the hearing of the arbitration are not in dispute. The question to be determined is simply this: Were the facts such that the learned arbitrator could properly find, as he did, that the employment of the workman began when he left his home on the evening of January 25, 1935? On the whole, and after full consideration of the reasons given in the Court of Appeal in answering this question in the negative, I feel constrained to come to an opposite conclusion. The employment of the workman on the occasion of the accident was on emergency work. There was no evidence as to its precise nature, and it might of course have been work of great urgency and importance. The fact that the payment of the workman was calculated from the time when he left home is not, I think, alone a sufficient reason for holding that his employment began at that time; but in the case of an emergency call it is, I think, a sufficient ground for taking the view that he was bound as from the moment when he left his house to

H. L. (E.) proceed with all reasonable expedition by the nearest available route to the place to which he had been summoned. We can test the view of the arbitrator by supposing that a superior officer of the company happened to meet the workman loitering on his way to the place or diverging from the proper route. Could not the officer properly have ordered the workman to proceed direct to the place to which he has been called? The circumstance as to payment affords, I think, a decisive answer in the affirmative. The case of a workman going to his ordinary daily work is plainly quite different.

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My Lords, I think the learned arbitrator in the particular circumstances was justified in coming to the conclusion that the workman's time after he left his home at 10.30 P.M. was not "his own," or in other words that he was not after that moment, to use another popular phrase, "his own master." The finding of the arbitrator cannot therefore be disturbed, and his award should be restored with the consequences already mentioned.

LORD ROCHE. My Lords, I agree that this appeal should be allowed. There is little that I desire to add as I am in entire agreement with the reasons for that conclusion stated by my noble and learned friends Lord Atkin and Lord Maugham.

A workman may be acting in the course of his employment or, put more shortly, he may be on duty, when in a public street. Ordinarily he is not so acting when proceeding to the place where his work proper begins. But he may be so if he is proceeding to that place by a prescribed route or by a prescribed means of conveyance. The circumstances here are different in that neither route nor conveyance were prescribed; but when Blee was summoned from his bed and was directed to proceed, in his employers' time, for which he was paid, to Hornsey siding, he was in my opinion bound to so proceed with all possible speed by the shortest possible route. His time was not his own. A servant carrying a message for his employer through the public streets may be on duty or in the course of his employment whilst so doing. He is usually under no control exercised immediately; but ordinarily he owes a

duty to his employer as to the manner in which he proceeds. He is on duty. Similarly in this case the special circumstances to which I have referred constitute, as I think, evidence to support the conclusion that the appellant was on duty at the time of the accident. Accordingly, I am of opinion that there was evidence which in law entitled the learned county court judge to find that the accident arose out of and in the course of the deceased man's employment.

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Appeal allowed.

Solicitors for appellant : *Pattinson & Brewer.*

Solicitor for respondents : *I. Buchanan Pritchard.*

[HOUSE OF LORDS.]

H. L. (E.)* THE BEAVERFORD (OWNERS) . . . APPELLANTS ;

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AND

June 28, 29 ; THE KAFIRISTAN (OWNERS) . . . RESPONDENTS.
July 1, 2, 28.

Shipping—Salvage—Salvage services by ship in same ownership as that of wrongdoing vessel—Whether salvage award recoverable.

There is no principle of law which prevents a ship which has rendered salvage services from obtaining a salvage award merely because she belongs to the person who also owns the vessel which caused or was partly responsible for the damage giving rise to the necessity for the salvage services.

The Glengaber (1872) L. R. 3 A. & E. 534 approved ; *Cargo ex Capella* (1867) L. R. 1 A. & E. 356 distinguished.

Dictum of Lord Phillimore in *The Melanie* [1925] A. C. 246, 262, that "the duty cast by the Merchant Shipping Acts upon "one of the two colliding vessels to stand by and render assistance, "does not prevent that vessel if she renders assistance from "claiming salvage," approved.

Decision of Court of Appeal [1937] P. 63 reversed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Bucknill J.

On June 16, 1935, the Canadian Pacific Railway Company's liner *Empress of Britain* was in collision in the Gulf of St. Lawrence with the steamship *Kafiristan*. The latter was badly damaged, and the *Empress of Britain* stood by her until the s.s. *Beaverford*, another ship belonging to the Canadian Pacific Railway Company, came up and took the *Kafiristan* in tow. The *Beaverford* towed for about 100 miles and then handed the *Kafiristan* over to tugs which took her to Sydney, Cape Breton. A writ was issued by the owners, master and crew of the *Beaverford* claiming salvage remuneration, but it was subsequently agreed that the case should go to arbitration and that Lloyd's standard form of salvage agreement should be signed. When the arbitration was held, liability for the collision had not been settled, and the point was raised whether, in the event of the *Empress of Britain* being found wholly or partly to blame, her owners, as owners

(1) [1937] P. 63.

* *Present*: LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

of the *Beaverford*, would be entitled to salvage. The arbitrator (K. S. Carpmael K.C.) held that in that event the Canadian Pacific Railway Company would not be entitled to any salvage remuneration, and he accordingly made alternative awards. In the event of the *Empress of Britain* being free from blame he awarded 1850*l.* to the owners and 550*l.* for expenses, 250*l.* to the master, and 350*l.* to the crew. Both parties appealed.

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The collision case was then settled on the basis that the *Empress of Britain* was three-fourths to blame and the *Kafiristan* one-fourth. The appeal arbitrator (Sir Norman Raeburn K.C.), who at the request of all parties made his award in the form of a special case, held that in these circumstances the Canadian Pacific Railway Company were not entitled to salvage, but that, in the event of the Court holding otherwise, the award to the owners made by the arbitrator should stand.

Bucknill J. upheld the award, and the claimants appealed.

The Court of Appeal (Greer, Slesser and Scott L.J.J.) dismissed the appeal, holding that the owners of a vessel which renders salvage service to a damaged vessel consequent upon a collision, for which another vessel belonging to the owners of the salving vessel is wholly or partly to blame, are disentitled to a salvage award.

The owners of the *Beaverford* appealed to this House.

Willink K.C., *Hayward K.C.* and *Vere Hunt* for the appellants. We submit that there is no principle of law which prevents a ship which has rendered salvage service from obtaining a salvage award merely by reason of the fact that she belongs to the same owners as the vessel whose wrongful action created the necessity for the rendering of the salvage service. It was conceded that the master and crew of the *Beaverford* were entitled to claim, but it was said for the present respondents that any claim by the owners was excluded on the ground that they were also the owners of the wrongdoing vessel; in other words, it was said that they could not benefit by their own wrong. That principle,

H. L. (E.) we contend, is wholly inapplicable. In the case of a wholly
 1937 delinquent ship rendering salvage services and claiming an
 THE award there may be a difficulty on the ground of circuitry of
 BEAVERFORD action, but no such difficulty arises where the services are
 v. rendered not by the delinquent ship but by an innocent sister
 THE ship. The Admiralty Court has always encouraged the
 KAFIRISTAN. rendering of salvage services, but the decision of Bucknill J.
 and the Court of Appeal in this case is directly contrary to
 that policy.

[LORD MACMILLAN. If a damaged vessel is in great peril, and a vessel in the offing is asked to render assistance, but the master replies that, as the damage was caused by a vessel in the same ownership as his vessel, he can give no assistance, because he would be unable to recover even his expenses, that would be disastrous.]

That is so. Every encouragement ought to be held out to ships to help each other when in peril. In *The Melanie* (1) Lord Phillimore appeared to take the view that even the colliding vessel might obtain an award for salvage services; and in *The Glengaber* (2) Sir Robert Phillimore said: "I know "of no authority for the proposition that a vessel wholly "unconnected with the act of mischief is disentitled to salvage "reward simply because she belongs to the same owners "as the vessel that has done the mischief." In *The Duc D'Aumale* (No. 2) (3), *The Glengaber* (2) was cited and distinguished, but its principle was affirmed. In *The Kenora* (4) the misconduct of the master and crew of a vessel engaged in rendering salvage services was held not to forfeit or diminish the claim of the owners of the salving vessel to an award, they being in no way privy to that misconduct. The right to maintain a claim for salvage is not affected by the provisions of the Merchant Shipping Acts as to the duty to render assistance after a collision: *The Hannibal* (5). To deny the right to claim salvage in the circumstances of the present case on the alleged ground that it would be against public

(1) [1925] A. C. 246, 262.

(2) (1872) L. R. 3 A. & E. 534.

(3) [1904] P. 60.

(4) [1921] P. 90.

(5) (1867) L. R. 2 A. & E. 53.

policy is an extravagant misapplication of that doctrine. H. L. (E.)
Public policy favours the rendering of salvage services. More-
over, it is to be borne in mind that it is the ship, not the
owners, which renders the service. The Continental Codes
allow an award if the Court thinks right.

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Further, there was in this case an agreement made as to
the rendering of salvage services and under that the salvors
are entitled to recover.

[They also cited *The Beta* (1); *The Glenfruin* (2); *The
Sampson and The Iola* (3); *The Clarita and The Clara* (4);
The Chas. E. Soper and The Osseo (5).]

Sellers K.C. and *J. V. Naisby* for the respondents. In salvage
it has been the invariable rule that a claim for an award
is maintainable only by an innocent salvor. As is stated in
Williams and Bruce's Admiralty Practice, 3rd ed., p. 158:
"Where salvors have been guilty of misconduct or negligence,
"the salvage will be reduced or wholly withheld . . . Persons
"who have contributed to place property in danger cannot,
"for obvious reasons, be allowed to claim reward for rescuing
"it from the consequences of their own wrongful acts," and
for this *Cargo ex Capella* (6) is cited. The decision in *The
Glengaber* (7) is inconsistent with previous decisions which
have clearly established that a wrongdoer is debarred from
claiming a salvage award. It is cited in *Kennedy's Law of
Civil Salvage*, 3rd ed., p. 92, with a query, and it appears
never to have been followed. Salvage is purely equitable in
its nature and that principle has been engrafted upon all
claims, thus requiring that a claimant must come with clean
hands. With regard to the agreement entered into, it was
signed after all the services were over, and it provided for
remuneration "if any."

The House took time for consideration.

1937. July 28. LORD ATKIN. My Lords, I have had the
opportunity of reading the opinion about to be delivered by my

(1) (1884) 5 Asp. M. L. C. 276.

(5) (1883) 19 Fed. Rep. 844.

(2) (1885) 10 P. D. 103.

(6) (1867) L. R. 1 A. & E. 356.

(3) (1857) 4 Blatch. (U. S.) 28.

(7) L. R. 3 A. & E. 534.

(4) (1874) 23 Wallace 1.

H. L. (E.) noble and learned friend Lord Wright, and as I entirely agree
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with it I find it unnecessary to state in a different form the same reasons for reversing the decision in the Court below. I will only add my personal opinion that the reasoning adopted in this case will require that careful consideration be given to the question of claims for salvage for services rendered by a vessel which is itself to blame. I wish, however, to make a few remarks on the effect of Lloyd's salvage agreement on the claim in this action. It cannot be ignored: for the agreement alone gave any authority to the arbitrator and the umpire to make any award, and to the Courts to determine the points of law raised by the umpire's award. When the agreement is examined, the terms appear to make it impossible for the defendants to contend that they are not liable to pay for salvage services, whatever may be the legal position if no agreement is made. The first stipulation is by the owner of the salving ship to use his best endeavours to save the injured ship and her cargo: and for this purpose he is by cl. 2 given a licence to use the vessel's gear. The services which he renders under this obligation are to be "rendered" and accepted as salvage services upon the principle of no "cure no pay." This obviously is intended to prevent any suggestion that they are not salvage services, e.g., that they are simply towage, and I think equally precludes the idea that they are not salvage services at all or, if salvage services, are not to receive any remuneration as such because the contractor's servants have been to blame for the collision. I asked counsel whether, in such circumstances as the present, the effect of his contention was that the salving owners were under an obligation to use their best endeavours to save, for breach of which they were liable in damages, but that the other parties to the agreement ab initio were at no time under any obligation to pay for the contractual services if successful. I think that he admitted reluctantly that this was so: and it leads to such a fantastic result as to seem to me impossible. As far as the agreement is concerned at this stage after the accident the question of fault seems to be irrelevant. Is it possible to imagine the master of the injured vessel saying

to the master of the proposed salvor, I want you to agree to do your best to salve me. You may have to risk your own ship and cargo and to deviate from your voyage and delay your adventure; but it is understood that if either you or any vessel of your owners is in any degree responsible for any damage you will get nothing. The obvious result would be no agreement, no attempt at salvage, other than the ordinary assistance given from humane motives, or sense of statutory duties under the Merchant Shipping Act. I think the suggested defence has no place in a claim under such an agreement as this. I am also satisfied that to confirm such a rule as has found favour below would be seriously to impair the encouragement to vessels at sea to render salvage services, which has always been the foundation of the whole doctrine of salvage. I wish to add in conclusion that I find nothing in the agreement in its present form which in any way makes the master or crew parties to the submission or gives any jurisdiction to the arbitrator to include any sum for them in his award. It may be a convenient practice that their claim should be considered by the arbitrator: but, unless there is a separate submission, any such award is not binding upon any one: and it may be worth while considering whether the form of agreement should not be altered in this respect.

I am authorized to state that my noble and learned friend Lord Thankerton has had the opportunity of reading the opinion about to be delivered by Lord Wright and that he concurs in it.

LORD MACMILLAN. I also concur in the opinion about to be read by my noble and learned friend Lord Wright, which I have had the advantage of perusing.

LORD WRIGHT. My Lords, this appeal raises an important question of the maritime law relating to salvage. It arises out of a collision which took place on June 16, 1935, in the Gulf of St. Lawrence, between the Canadian Pacific liner *Empress of Britain*, owned by the appellants, and the steamship *Kafiristan*, owned by the Hindustan Steamshipping Co., Ltd.

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H. L. (E.) The *Kafiristan* was so badly damaged as to require salvage assistance. The *Empress of Britain* stood by for about 1937 six hours, when the *Beaverford*, a vessel also owned by the THE BEAVERFORD v. THE KAFIRISTAN. Lord Wright. appellants, came up. Other vessels were approaching, including one belonging to the respondent owners of the *Kafiristan*. But at the request of the master of the *Kafiristan*, the master of the *Beaverford* took the *Kafiristan* in tow for Sydney, Nova Scotia, and towed her stern first for about 100 miles, when a salvage vessel, the *Foundation Franklin*, arrived and duly completed the towage to Sydney. It is not disputed that the *Beaverford* performed services of such a nature as materially to contribute to the safety of the *Kafiristan*, and, subject to the question of law to be discussed later, to entitle her to a salvage award.

On July 13, 1935, Lloyd's standard form of salvage agreement was signed in this country by the appellants and respondents.

Under this agreement an arbitration was held before Mr. Carpmael K.C., who was appointed by the Committee of Lloyd's, in accordance with the agreement recited in his award dated February 4, 1936, which also recited that the appellants salvaged the *Kafiristan* and her cargo in accordance with the said agreement. When the arbitrator made his award it had not been ascertained whether either or both vessels were to blame for the collision. The arbitrator was of opinion that if the *Empress of Britain* was wholly or partly to blame for the collision, the appellants were not entitled to salvage as owners of the *Beaverford*, but, if they were free from blame, they were entitled to 1850*l.*, together with 550*l.* for expenses. Whether the *Empress of Britain* was to blame or not, he awarded to the master and crew of the *Beaverford* 600*l.* By another award he held that the owners of the *Foundation Franklin* were entitled to 3500*l.*

There were appeals from both awards to Sir Norman Raeburn K.C., who made an award on July 1, 1936. By that time it had been agreed that the *Empress of Britain* and the *Kafiristan* were both to blame, the *Empress of Britain* to the extent of 75 per cent., the *Kafiristan* to the extent of

25 per cent. The award recited (inter alia) that as a result of the collision the *Kafiristan* was so damaged as to require salvage assistance and that such assistance was rendered by the *Beaverford* under the agreement dated July 13, 1935, and that Sir Norman Raeburn had been appointed by the Committee of Lloyd's under clause 8 of the agreement as arbitrator in the appeals. The award, which was in the form of a special case for the opinion of the Court, proceeded to find that the salvage services rendered by the *Beaverford* were rendered under the agreement and that the parties had settled between them that both vessels were to blame in the proportions which I have set out above. It then stated the question for the opinion of the Court to be whether the fact that the *Empress of Britain* was partly to blame for the collision disentitled her owners as owners of the *Beaverford* to a salvage award for the services rendered to the *Kafiristan*. He awarded, subject to the opinion of the Court, that they were not entitled to any salvage award, but awarded that the master and crew of the *Beaverford* were entitled to an award against the owners of the *Kafiristan* and her cargo of 600*l.* In the alternative, if the Court should be of opinion that the owners of the *Beaverford* were entitled to a salvage award, then, in addition to the 600*l.* awarded to the master and crew, he awarded to the appellants 1850*l.*, with 550*l.* for expenses.

The award in favour of the master and crew has not been disputed and is not in issue in these proceedings.

The special case in due course was heard before Bucknill J., sitting in the Admiralty Division, who upheld the award. He based his conclusion mainly on the principle, which he held to apply, that no man could profit by his own wrong, and that the wrong, or negligence, of which the appellants had been guilty by their servants on the *Empress of Britain* prevented them from claiming any advantage from the salvage services which others of their servants had rendered from the *Beaverford*. In effect he held that the law laid down by Sir Robert Phillimore in *The Glengaber* (1), was bad law. He dismissed the contention that the respondents by entering

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His judgment was affirmed on appeal by the Court of Appeal, who gave leave to appeal to this House, Greer L.J. saying that he would welcome the assistance of the House of Lords. Greer L.J. dismissed the appeal solely, or at least principally, on the ground that he was bound by authority. He said that it did seem to him that a ship entirely at fault for a collision might properly be encouraged to render salvage services which would more than wipe out the fault which it had already committed. "So far from taking advantage "of its own wrong, it is trying to set right that which it has "done, which was wrong." A fortiori should this be so when the salving vessel is only to blame in a lesser degree. He thought the matter was concluded for him by authority binding on the Court of Appeal which compelled him to decide that the appellants, being owners both of the *Beaverford* and the *Empress of Britain*, could not claim for salvage services rendered by the former vessel any more than they could have claimed for salvage services rendered by the latter. Slessor L.J. accepted the principle that the wrongdoer was disentitled to claim salvage and held that its application was not affected by the fact that he was claiming salvage rendered through the instrumentality of another of his ships, which was not concerned in the actual collision. He thought *The Glengaber* (1) was not an authority to be followed. Scott L.J. was of the same opinion, though he thought that the decision was a hardship on the appellants and that it might be in the general interest that the rule should be altered. From these judgments this appeal came before your Lordships.

It is to be observed that the only reference in these judgments to the Lloyd's salvage agreement, under which the salvage services were rendered and the arbitration was held, is by Bucknill J. in the passage I have referred to, in which he dismissed a contention based upon it. Your Lordships were told that by some consent between the parties no point based on the agreement was to be taken and your

(1) L. R. 3 A. & E. 534.

Lordships were asked to consider the question as if the Lloyd's salvage agreement had never been signed. Your Lordships refused to deal with the appeal on this false and artificial basis. It is the duty of this House to decide actual questions on the facts of the case which is brought before them. They ought not, whether the parties consent or not, to deal with what is in truth a hypothetical question, that is, a question arising not on the true facts, but on an artificial and arbitrary selection of the facts. In the present case the Lloyd's salvage agreement is an essential fact. As I have already said, the services were rendered under it and the arbitration was held in accordance with its terms, as indeed the award recites. I shall in the first place proceed to set out its terms.

The contract was in fact executed in this country, about a month after the collision, by the appellants on the one hand and the respondents on the other. There was, therefore, no possibility of treating it as an improvident bargain extorted by the pressure of urgent necessity. There is indeed no suggestion that it is not a valid and binding contract. By cl. 1 the contractor (who would have been the master of the *Beaverford* if the contract had been executed on the spot), agreed to use his best endeavour to save the *Kafiristan* and her cargo and take them into or other place to be thereafter agreed with the master, providing at his own risk all proper steam and other assistance and labour. The services were to be rendered and accepted as salvage services on the principle of "no cure—no pay." No fixed sum of remuneration for the services was mentioned, but the amount was to be fixed by arbitration in London. It was provided that the contractor was to be entitled to make reasonable use of the vessel's gear, anchor and cables and other appurtenances during and for the purpose of the operation free of cost, but was not unnecessarily to abandon or sacrifice the same or any other of the property. Detailed provisions were set out relating to liens, to security and to the conduct of arbitrations and appeals. The arbitration and appeal in the present case were duly conducted under those provisions. By cl. 13 it was further provided that the

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H. L. (E.) master entered into the agreement as agent for the vessel,
 1937 and the cargo and the respective owners thereof, and bound
 THE each (but not the one for the other or himself personally) to
 BEAVERFORD the due performance thereof. The parties to the arbitration
 v. and subsequent proceedings, including this appeal, were
 THE accordingly the owners of the *Beaverford* and the owner of
 KAFIRISTAN. the *Kafiristan* and her cargo. It was agreed that if the
 Lord Wright. agreement was executed after the salvage services had been
 rendered, its provisions were to apply mutatis mutandis.

The view which has so far prevailed and which has been urged before your Lordships on behalf of the respondents is that according to the law of maritime salvage the appellants cannot claim any remuneration because by their servants on the *Empress of Britain* they were responsible (at any rate in part) for the collision and that to allow them salvage remuneration for the services rendered by them by means of the *Beaverford* would be to allow them to profit by their own wrong. It is said that the Lloyd's salvage agreement merely provides machinery, and expressly deals with the services as salvage services, and must accordingly be governed by the principle which as just stated is said to apply to questions of salvage services. The case, it was contended, is indistinguishable so far as the claim of the shipowners is concerned from that of a case where a ship, in whole or in part responsible for a collision, performs salvage services but is held to be not entitled to any award for salvage remuneration. The principle in this latter case was said to have been established by authorities such as *The Minnehaha* (1) and *Cargo ex Capella* (2), and other authorities ever since acted upon. Where the salving vessel, though belonging to the same owners as the vessel in whole or in part responsible for the collision, was innocent and came up after the accident, the position, so it was contended, was the same except that the crew of the innocent vessel were not debarred, as were the crew of the vessel which had participated in the collision, from being awarded salvage. Hence, in the present case the award made in the arbitration in favour of the master and

(1) (1861) 15 Moo. P. C. 133.

(2) L. R. i A. & E. 356.

crew of the *Beaverford* was not disputed; but it was submitted that the appellants were not entitled to any salvage award. H. L. (E.)

The appellants claimed that these contentions were wrong and that both on authority and on principle, as well as under the terms of the Lloyd's salvage agreement, the alternative award of Sir Norman Raeburn in their favour "if the Court should be of opinion that the owners of the *Beaverford* are entitled to a salvage award" should be upheld. In my opinion the claims of the appellants are well founded. I shall consider the question first as one of principle and then refer to the authorities, disregarding for the present the agreement.

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There is here no dispute that the services rendered by the *Beaverford* were meritorious and contributed to the eventual safety of the *Kafiristan* and her cargo. They were voluntary. There was no such complication as might arise in the case of a colliding vessel. As to that I think it is clear law that the duty cast by the Merchant Shipping Acts on one of the two colliding vessels to stand by and render assistance does not in itself prevent even that vessel if she renders assistance from claiming salvage. I adopt the words of Lord Phillimore in *The Melanie*. (1) It is also clear that the policy as to maritime law favours the grant of awards for meritorious salvage in order to encourage the rendering of salvage services. This policy should particularly apply to the facts of this case, in which, when the *Beaverford* came up, other vessels were supposed to be coming up. If the view put forward by the respondents be correct, the master of the *Beaverford* might well have been tempted to say to himself that his vessel would be debarred from any reward, if the *Empress of Britain* was to blame, even in a comparatively small degree, and to leave the work to other salvors not subject to any such disability. This course at the least must involve delay while the other salvors came up, which might have serious consequences. But the maritime law of salvage is based on principles of equity. There does not seem to be any reason in equity why the salvaged vessel (if I may adopt that sort of personification of the ship which as Lord Sumner

H. L. (E.) said in *The Susquehanna* (1), is inveterate in Admiralty cases) should not pay the appropriate salvage remuneration merely because the salving vessel belongs to the same owners as the other colliding vessel. That fact seems to be irrelevant so far as concerns the usefulness and meritorious character of the actual services rendered. This is not less true when the possibility of the other colliding vessel being held to blame in whole or in part is taken into account. That consideration ought not, it would seem, to affect the evaluation of the salving vessel's services. It receives due effect at a later stage in the transaction. If the other colliding vessel is solely to blame, the owner of the salvaged vessel, which is blameless, will bring into his account of damages the whole sum awarded to the salving vessel for salvage. It may be that in such a case a salvage award in favour of the shipowners is superfluous and need not be made, on the principle of circuitry of action, but the responsibility for the collision is mostly ascertained after the salvage award is made, and in any case there may be questions of limitation of liability. Where, however, both colliding vessels are to blame, the fixing of the salvage remuneration would seem to be a necessary step in setting off the items of damage on the one side or the other so as to ascertain the final balance of account. It is true that the owners of the other colliding vessel are in law responsible for the damages caused by the negligence of their servants including the amount of any salvage awarded to the salving vessel which they also own, but the equities are best worked out by making the salvage award without regard to the fact of common ownership, leaving the incidence of what is awarded to depend on the relative proportions of blame.

Thus in the present case the amount of the award will be borne ultimately by the *Kafiristan* and her cargo to the extent of 25 per cent. and by the appellants to the extent of 75 per cent. This seems obviously a more equitable procedure than to refuse any award at all to the appellants for the services rendered by the *Beaverford*. I do not feel that so inequitable a result can be justified by the rubric "that no man can profit

(1) [1926] A. C. 655, 664.

"by his own wrong," which indeed in my opinion is wholly inapplicable. The claim to salvage is not based on the fact that the *Empress of Britain* was guilty of negligent navigation. It is based on a separate fact, that the *Beaverford* rendered salvage services. It is for these meritorious services and not for the negligence of the crew of the *Empress of Britain* that the appellants claim the right to have salvage awarded. They are not seeking to profit by their own wrong, for which in the final account they will make the appropriate compensation by, among other things, bearing their proper share of the salvage award.

It is, however, said that if the principle that no man can profit by his own wrong excludes a claim for salvage where the salving vessel is the colliding vessel, as was held in the *Cargo ex Capella* (1), and other cases, the same principle should apply where the salving and the negligently colliding vessel belong to the same owner, because the wrong is committed by the person who salves, acting in either case by his servants. I shall assume that the principle there is established. I am doubtful of the logic or equity of it, but do not consider it necessary to express any final opinion about it here, because I do not think it applies logically to, or is proper to be extended to, the case where the salving vessel is innocent of and wholly unconcerned in the collision. It is, I think, in accordance with the ideas of maritime law to treat in a case like this for purposes of salvage the vessels concerned as separate entities, and to disregard at that stage the aspect of common ownership and the consequences of the rule of vicarious liability. Thus the owner of the salving ship is dissociated from himself as owner of the wrongdoing ship. If the rule laid down in *Cargo ex Capella* (1) is at all sound, it is at any rate excluded where the ship which is the instrument of the salvage is a different ship from that which is the instrument of the negligent collision. It is, however, said that such a view would be contrary to the practice observed in these matters and acted upon in the present case by the experienced arbitrators who decided the matter in

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H. L. (E.) accordance with the practice. I find it impossible to give weight to these contentions for various reasons. In the first place I have no evidence that cases in which the salving vessel and the negligent colliding vessel belong to the same owners are at all frequent or capable of founding a practice. No doubt cases where the salving vessel is one of the colliding vessels are more common, and the rule which seems to be recognized there is extended to the present case. But in any event the practice of those experienced in maritime law, if it really exists, cannot change the law, any more than the practice of average adjusters: *Svensden v. Wallace*. (1) The Court must decide the question according to the requirements of justice and sound reasoning, and on the basis of such authority as there is to be found in decided cases and books of authority. The earlier decisions of this House give no guidance on the matter, which indeed does not seem to have come even before the Court of Appeal until this dispute. But there is direct authority in the Admiralty Court in support of the appellants' contention. In *The Glengaber* (2) the *Warrior* tug rendered salvage services to the *Glengaber*, which had been put in peril by the negligence of another tug, the *Black Prince*. There were common owners of the two tugs. Sir Robert Phillimore rejected the objection that salvage could not be awarded to the *Warrior* because some of her owners were also owners of the *Black Prince*. He said: "This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the *Warrior* who are not owners of the *Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief." That was in 1872, and there is still no authority for the proposition which Sir Robert Phillimore rejected. On the contrary, the accuracy of the principle which he enunciated has, so far as I know, never been

(1) (1884) 13 Q. B. D. 69, 85. (2) L. R. 3 A. & E. 534, 535.

contested. Thus in *The Duc d'Aumale* (No. 2) (1) Gorell Barnes J. referred to *The Glengaber* (2) as being a case where by improper navigation of a steam tug a vessel at anchor was sent adrift and placed in jeopardy. Another steam tug rendered assistance to the drifting vessel and it was held that the owners of that steam tug were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. Later the judge observed (3): "In the case of *The Glengaber* (2), the steam tug which came up and rendered assistance had nothing to do with the accident which originally brought about the difficulty." These observations were obiter dicta. In *The Duc d'Aumale* (No. 2) (1) the claim was by owners of the tug which had been jointly responsible with the tow for causing the danger and by the master and crew of the tug. The claim of the tug owners was rejected on the principle stated in the *Cargo ex Capella* (4), and that of the master and crew on the ground that their negligence had caused the peril, the crew being identified with the negligent master on grounds of public policy which I need not here discuss but which seem to me as at present advised to be of dubious soundness. There was in that case no question of an independent salving vessel of the same ownership as the negligent vessel. The importance of the case is that Gorell Barnes J., a most experienced Admiralty judge, treats *The Glengaber* (2) as good law and as involving different principle and to be distinguished from the *Cargo ex Capella* (4). Gorell Barnes J. also refers to *The Glenfruin* (5), and suggests that the view taken in that case by Butt J. differs from that of Sir Robert Phillimore. In that case salvage services were rendered to the *Glenfruin* and her cargo by another vessel, the *Glenavon*, which was in part owned by the same persons as those who were owners of the *Glenfruin*. The danger which rendered the salvage necessary arose from the unseaworthiness of the *Glenfruin*, for which her owners were liable to the cargo owners under

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(1) [1904] P. 60, 73.

(2) L. R. 3 A. & E. 534.

(3) [1904] P. 74.

(4) L. R. 1 A. & E. 356.

(5) 10 P. D. 103.

H. L. (E.) the contract of carriage. Butt J. awarded salvage to the masters and crew of the *Glenavon*, and also (pro tanto) to the part owner of the *Glenavon* who had no share in the ownership of the *Glenfruin*. But the ground on which the judge refused salvage to the part-owners of the *Glenavon*, who were also part-owners of the *Glenfruin*, was that such part-owners, being liable under the bills of lading to the cargo owners for the damages, "would be liable to reimburse the defendants "any amount of salvage which I might award. To avoid "what is called 'circuitry of action' I must decline to make "any award to these plaintiffs." This view implies that apart from circuitry of action the claim of the *Glenavon* would have succeeded in full. The principle that salvage is not recoverable where the salving vessel is to blame for the collision is not based on avoiding circuitry of action. Thus in *Cargo ex Capella* (1) both vessels were to blame and the damages would in accordance with the rule before the Maritime Convention Act, 1911, be apportioned in equal parts. *The Glenfruin* (2) is not in my opinion inconsistent with *The Glengaber* (3), nor are the analogous cases of towage contracts, where the common owner of the wrongdoing tug and of the salving tug would generally be liable to repay in damages the full amount of any salvage award if made in his favour and paid to him for the services of the innocent salvor. Thus in *The Maréchal Suchet* (4), tug owners were claiming awards for salvage services rendered by one of their tugs. The danger was caused by the unfitness and the negligence of that tug while towing the *Maréchal Suchet* under a towage contract. The claim was rejected because the unfitness and negligence of that tug constituted a breach of the towage contract. The plaintiff's counsel admitted that if that were so they could not claim salvage for the services of three other tugs belonging to the plaintiffs which had come up. I do not know the reason for that admission; it may have been because the case was covered in principle by *The Glenfruin*. (2) But in that case the masters and crew of the

(1) L. R. 1 A. & E. 356.

(2) (1885) 10 P. D. 103.

(3) L. R. 3 A. & E. 534.

(4) [1911] P. 1.

three innocent tugs were awarded salvage. So far as they were concerned there was no question of circuitry of action. If they were to be treated as entitled to salvage because identified with the three innocent tugs on which they respectively served, it would seem to recognize that if it were not for the question of breach of the towage contract salvage could properly have been awarded in respect of these tugs, but for the fact that it would obviously have been futile to make any such award. It is only when the salving vessel is to blame for the collision that it seems that not only the members of the crew actually in fault, but the whole crew, however meritorious their services, are debarred. I feel doubt about the equity or policy of so sweeping a rule, but it is not necessary to consider it here. The special case of theft by salvors in the course of salvage operations has often been discussed, as for instance in *The Clan Sutherland* (1), where salvors who had either stolen or by their remissness had failed to prevent their fellows from stealing, were held debarred from recovering salvage, except two lieutenants who, though by want of proper supervision they had failed to prevent the thefts, were held not debarred altogether and were given a reduced award in consideration of their very meritorious services.

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Your Lordships were asked to say that the principles laid down by Sir Robert Phillimore in *The Glengaber* (2) were bad law. On the contrary, they are in my judgment sound in reason and supported by authority. I may add that they are treated as good law in recognized works on maritime law, as, for example, in Kennedy on Civil Salvage, 3rd ed., p. 92; Marsden's Collisions at Sea, 9th ed., p. 249; Roscoe's Admiralty Practice, 5th ed., p. 141. I quote from the current editions, which do not in this matter differ from what the deceased authors wrote.

In my opinion, even if there had not been a Lloyd's salvage agreement executed between the parties, the salvage would have been claimable. But that agreement seems to me to put the matter beyond doubt. I have already observed

(1) [1918] P. 332.

(2) L. R. 3 A. & E. 534.

H. L. (E.) that its validity is not and could not be contested. It specifically provides for remuneration as salvors in the event of success ; there is no reservation for the possibility that the *BEAVERFORD* ¹⁹³⁷ ^{THE} *Empress of Britain* was in whole or in part to blame; I see ^{THE} ^{KAFIRISTAN.} no ground for implying any such reservation. In my judgment, in view simply of the agreement, the condition propounded by Sir Norman Raeburn in para. 9 of his award that " the owners of the *Beaverford* are entitled to a "salvage award " must be taken to be established, so that his alternative award set out in that paragraph should be upheld.

The appeal should in my opinion be allowed, the order of Bucknill J. and of the Court of Appeal should be set aside, the award in the alternative should be upheld and the appellants should have their costs of this appeal and their costs in the Courts below.

LORD MAUGHAM. My Lords, I am in complete agreement with the opinions of my noble and learned friends Lord Atkin and Lord Wright. It may not be superfluous to add a few words in relation to the "Conventions for the unification "of certain rules of law respecting collisions and assistance "and salvage at sea " signed at Brussels on September 23, 1910. These Conventions were signed on behalf of Great Britain and nearly all the maritime countries of the world. Art. 8 of the Convention relative to salvage contained this paragraph : "The Court may reduce or deny remuneration, "or may award a reduced remuneration, if it appears that "the salvors have by their fault rendered the salvage or "assistance necessary or have been guilty of theft, fraudulent "concealment or other acts of fraud." I think it useful to state that the proceedings prior to the signature of the Conventions contain nothing to suggest that, according to maritime law as understood by countries other than our own, the fault of a ship leading or contributing to a collision ipso facto deprived the owners of the ship of a right to remuneration for salvage services.

Steps were taken to pass legislation here carrying into effect, so far as necessary, the Convention agreements. The Maritime

Conventions Act, 1911, contained a preamble referring to the fact that at the Brussels Conference of the previous year two conventions dealing respectively with collisions between vessels and with salvage were signed on behalf of His Majesty, and also stating that "it is desirable that such amendments should be made in the law relating to merchant shipping as will enable effect to be given to the conventions"; but by some mischance the Act, though it contained five important sections containing provisions as to collisions at sea and two containing provisions as to salvage, omitted to contain anything dealing with the portion of Art. 8 of the Convention relating to salvage above quoted. Most of the other countries whose plenipotentiaries signed the Conventions have passed the necessary legislation to give effect to the Conventions, including that portion of Art. 8; and it seems so desirable, as the Conventions themselves show, that rules on these topics should be uniform that it may well be expedient to take an early opportunity of remedying this omission. If that had been done in the Act of 1911 this litigation or the greater part of it would have been unnecessary; for the circumstances of the case are far from suggesting any shadow of a ground or any equitable principle for depriving the owners of the *Beaverford* of the award for salvage conditionally awarded to them by the learned arbitrator.

My Lords, I agree with the proposed motion.

LORD ATKIN. My Lords, I would like to say that I hope the important suggestion by my noble and learned friend Lord Maugham will be considered by the competent authorities.

Appeal allowed.

Solicitors for appellants: *William A. Crump & Son.*

Solicitors for respondents: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

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AND

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Nov. 22.

Principal and Surety—Recital in guarantee that loan was secured on certain shares—Shares not in fact issued—Liability of guarantors—Estoppel by recital.

By an agreement made between A. company and M. company A. company, in consideration of an advance to it of 250,000*l.* by M. company, agreed to repay that sum with interest, and charged certain specified shares as security, among these being 275,000 fully paid shares of 1*l.* each in the I. company. By another agreement of even date made between the P. company and the M. company, which recited that in consideration of the M. company having, at the request of the P. company, advanced to the A. company the said sum of 250,000*l.* on the security of the above mentioned charge, which was set out in the Schedule, and showed the 275,000 shares in the I. company to be included in the charge, the P. company covenanted that, in the event of the A. company failing to repay that sum, the P. company should be considered and held as principal debtors for all moneys secured by the first agreement, and it further provided that, as guarantors, the P. company should not be released or their liability affected by time being given to the borrowers or by the M. company omitting or neglecting to protect the security created thereby, or by any other act, omission or thing whatsoever whereby but for this provision the guarantors, as sureties only, would have been released. When these agreements were entered into, both the M. company and the P. company believed that the 275,000 shares in the I. company had been validly issued; but later it was discovered that those shares had not been issued, and that accordingly the debt had never been secured on these shares.

The A. company not having repaid the whole of the loan to the M. company, the liquidator of the latter company claimed the unpaid balance from the P. company :—

Held, (1.) that as what the P. company agreed to guarantee was the repayment of a debt effectively secured by (*inter alia*) 275,000 fully paid shares in the I. company, and as in fact the debt was not so secured, the P. company was under no liability, and was not estopped by the terms of the recital in the guarantee.

(2.) that on the true construction of the guarantee the recital was intended to be the statement of the M. company and not to be that of the P. company.

* *Present* : LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD MAUGHAM, and LORD ROCHE.

Decision of Patteson J. in *Stroughill v. Buck* (1850) 14 Q. B. 781, 787, that "When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument," approved.

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Per Lord Maugham: The same result might have been reached on the ground that the recital was inserted by a common mistake, applying the principle adopted by Lord Romilly M.R. in *Brooke v. Haymes* (1868) L. R. 6 Eq. 25, that "a party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part."

Lainson v. Tremere (1834) 1 A. & E. 792 disapproved.

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal reversing a decision of Bennett J.

The appellants were the joint liquidators of Mercantile Marine Finance Corporation, Ltd. (hereinafter called "Mercantile Marine").

On March 20, 1929, Mercantile Marine, at the request of Parent Trust and Finance Co., Ltd. (hereinafter called "Parent Trust") advanced to Austin Friars Trust, Ltd. (hereinafter called "Austin Friars") the sum of 250,000*l.*, that loan being secured by an agreement under seal dated March 20, 1929, made between Austin Friars and Mercantile Marine (hereinafter called "the said charge") and by the guarantee of Parent Trust contained in a guarantee under seal also dated March 20, 1929, and made between Parent Trust of the one part and Mercantile Marine of the other part (hereinafter called "the said guarantee").

By the said charge it was agreed as follows: (1.) In consideration of the loan of 250,000*l.* Austin Friars agreed to repay the same on June 30 then next, together with interest thereon at the rate of 8 per cent. (2.) Austin Friars thereby charged the shares mentioned in the schedule thereto as a security for the repayment of the said loan and interest, and conferred power on Mercantile Marine to sell the shares. The securities comprised in the schedule to that agreement were described as 275,000 shares of 1*l.* each in Iron Industries, Ltd.,

H. L. (E.) 50,000 ordinary shares of 10s. each in Retail Trade Securities, Ltd., and 25,000 ordinary shares of 1l. each in Corporation and General Securities, Ltd., all such shares being stated to be fully paid.

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By the said guarantee, after reciting that Mercantile Marine (therein called "the Corporation") had at the request of Parent Trust advanced to Austin Friars the sum of 250,000l. "on the security of a charge dated March 20 1929 on the shares "particulars of which are set out in the schedule hereto," it was agreed as follows: "In consideration of the corporation "having at the request of the guarantors advanced to "the borrowers [Austin Friars] the said sum of 250,000l. "the guarantors hereby covenant with the corporation "that in the event of the borrowers failing to repay the "said sum of 250,000l. and interest as provided in the "said charge on June 20 next forthwith to repay to the "corporation the said sum of 250,000l. together with all "interest due and to become due thereon or on any judgment "which may be recovered hereunder at the rate of 8 per "cent. per annum Provided however that should the "interest rate of the Bank of England at any time be increased "from the amount prevailing at the date hereof whilst the "said loan or any part thereof is outstanding then the interest "secured thereby is to be increased by a similar amount and "that whatever may now or hereafter be the position between "the borrowers and the guarantors as sureties, the guarantors "shall be considered and be liable as principal debtors for "all moneys secured by the said charge and that the guarantors "and their successors shall not be released nor shall their "liability hereunder be affected by time being given to the "borrowers or by the corporation omitting or neglecting to "protect the security created hereby or by the said charge or "by any other arrangement or dealing between the borrowers "and the corporation in reference to the said security or by "any other act omission matter or thing whatsoever whereby "but for this provision the guarantors as sureties only would "have been so released." The schedule to the guarantee was a copy of the schedule to the charge.

On June 20, 1929, and on August 20, 1929, Austin Friars repaid to Mercantile Marine two sums of 50,000*l.* each on account of the principal of the loan, and, at the request of Parent Trust, Mercantile Marine extended the time for repayment of the balance of the loan, and in consideration of that extension Parent Trust on each occasion covenanted with Mercantile Marine that the guarantee should remain in full force and effect in every respect for the reduced sum. Austin Friars paid the interest on the loan down to August 21, 1929. On September 24, 1929, an order was made for the compulsory winding up of Austin Friars. Austin Friars failed to repay the balance of 150,000*l.* principal or to pay any interest due thereon after August 21, 1929.

On July 11, 1932, Parent Trust was ordered to be wound up by the Court, and the present respondent was appointed liquidator.

The appellants contended that Parent Trust was indebted under the guarantee to Mercantile Marine in the sum of 184,685*l.* 1*s.* 1*d.*, being balance of principal of the said loan and interest thereon calculated at 8 per cent. from August 21, 1929, to July 11, 1932, the date of the winding-up order, and on July 11, 1935, the appellants as liquidators of Mercantile Marine lodged in the liquidation of Parent Trust a proof for 184,685*l.* 1*s.* 1*d.* and interest at 8 per cent.

On July 26, 1935, the respondent as liquidator of Parent Trust gave notice to the appellants rejecting their proof on the following grounds: (a) and (b) to the extent of the claim for interest in excess of the rate of 5 per cent., and (c) to the extent of the entire claim on the ground that the guarantee was made subject to the condition or was entered into upon the representation that the loan to Austin Friars was secured by a valid and effectual charge upon the shares mentioned in the schedule to the guarantee, whereas in fact no such charge then existed or had ever existed upon the 275,000 shares of 1*l.* each of Iron Industries, Ltd., inasmuch as the said shares were never issued or never validly issued and therefore that the guarantee was not and never had been binding upon or was voidable by Parent Trust and was in fact avoided

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 — by Parent Trust at the date of the covenants entered into
 by Parent Trust in June and August, 1929, respectively, and
 that these covenants were not and never had been binding
 upon Parent Trust.

The appellants appealed from the rejection of their proof and in the proceedings following thereon it was admitted that the shares in Iron Industries, Ltd. had not in fact been validly issued, and the main question was whether by reason of the fact that the loan to Austin Friars was never secured by an effective charge upon 275,000 shares in Iron Industries, Ltd., Parent Trust ever came under any liability by virtue of the guarantee.

Bennett J. decided that Parent Trust was liable under the guarantee, but that the interest on the debt was limited to 5 per cent.

Parent Trust appealed and the liquidators of Mercantile Marine cross-appealed.

The Court of Appeal (Lord Wright M.R., Romer and Greene L.JJ.) allowed the appeal, holding that what Parent Trust guaranteed was the repayment of a debt effectively secured upon (inter alia) 275,000 fully paid shares in Iron Industries, Ltd., and, as in fact the debt was not so secured, Parent Trust came under no liability.

The liquidators of Mercantile Trust appealed to this House.

Sir William Jowitt K.C., D. N. Pritt K.C. and Wilfrid M. Hunt for the appellants. As the appellants, at the request of Parent Trust, advanced the 250,000*l.* to Austin Friars, they are entitled to pray in aid the doctrine of estoppel by which Parent Trust cannot be heard to deny the statement in the recital that the charge included 275,000 fully paid shares in Iron Industries, Ltd.: *Lainson v. Tremere* (1); *Bowman v. Taylor* (2); *Evans v. Bremridge*. (3) It cannot be said that the statement was an assertion by Mercantile Trust only,

(1) 1 A. & E. 792.

(3) (1856) 8 De G. M. & G. 100.

(2) (1834) 2 A. & E. 278.

particularly as that company acted in the matter at the request of Parent Trust. As was held in *Carpenter v. Buller* (1), where a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference thereto, it is not competent to the party bound to deny the accuracy of the recital: see also *Young v. Raincock* (2); *Stroughill v. Buck*. (3)

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[LORD ROCHE. Was not the Parent Trust saying: "We will guarantee the repayment of a loan advanced on a valid charge" ?]

Each of the parties knew as much or as little as the other. They contracted on the basis of the recitals with the consequence that Parent Trust cannot escape liability. In any view the language of the last clause of the guarantee is sufficient to protect the appellants.

Cyril Radcliffe K.C., *C. R. R. Romer K.C.* and the *Hon. Charles Russell* for the respondent were not called upon.

The House took time for consideration.

1937. Nov. 22. LORD ATKIN. My Lords, I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends Lord Russell of Killowen and Lord Maugham. I agree with them, and I have nothing to add.

Perhaps I may also say now that my noble and learned friend Lord Macmillan has also had an opportunity of reading those opinions, and he also concurs in them.

LORD RUSSELL OF KILLOWEN. My Lords, the main question for our decision in this appeal is whether a company called Mercantile Marine Finance Corporation, Ltd. (to which I will refer, for brevity's sake, as "Mercantile Marine") is entitled to prove in the liquidation of another company called Parent Trust and Finance Company, Ltd. (to which I will refer as "Parent Trust"), for a principal sum of

(1) (1841) 8 M. & W. 209.

(3) 14 Q. B. 781.

(2) (1849) 7 C. B. 310.

H. L. (E.) 150,000*l.*, together with interest thereon. There are certain subsidiary questions in regard to interest, but these naturally only arise in the event of Mercantile Marine being entitled to prove for the principal sum.

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The claim arises under an agreement of guarantee dated March 20, 1929, and made between Parent Trust and Mercantile Marine, the guarantee relating to a sum of 250,000*l.* which had been advanced by Mercantile Marine to a company called Austin Friars Trust, Ld. (to which I will refer as Austin Friars), under an agreement of charge also dated March 20, 1929, and made between Austin Friars and Mercantile Marine.

The case presents this feature, namely, that no evidence is available of the circumstances in which the loan was made or the guarantee given, except what appears from the documents themselves. The documents and certain admissions by the parties are the only materials which we can consider in deciding this appeal.

By the agreement of charge, Mercantile Marine advanced the sum of 250,000*l.* to Austin Friars; Austin Friars agreed to repay it on June 20 then next with interest at the rate of 8 per cent. per annum, and charged certain securities mentioned in the schedule thereto with the repayment of the said advance and interest. The schedule contained the following items, namely: (1.) 275,000 shares of 1*l.* each fully paid in Iron Industries, Ld.; (2.) 50,000 ordinary shares of 10*s.* each fully paid in Retail Trade Securities, Ld.; (3.) 25,000 ordinary shares of 1*l.* each fully paid in Corporation and General Securities, Ld.

The agreement of guarantee must be referred to in greater detail. In it Mercantile Marine is called "the Corporation," while the words "the guarantors" mean Parent Trust. It contains one recital only, which runs thus: "Whereas the "corporation have at the request of the guarantors advanced "to the Austin Friars Trust Ld. (hereinafter called 'the "borrowers') the sum of Two hundred and fifty thousand "pounds on the security of a charge dated March 20 One "thousand nine hundred and twenty-nine on the shares "particulars of which are set out in the schedule hereto."

The schedule is an exact repetition of the schedule to the agreement of charge, and therefore includes the 275,000 shares in Iron Industries, Ltd. The rest of the agreement consists of the following words: "In consideration of the corporation having at the request of the guarantors advanced to the borrowers the said sum of Two hundred and fifty thousand pounds the guarantors hereby covenant with the corporation that in the event of the borrowers failing to repay the said sum of Two hundred and fifty thousand pounds and interest as provided in the said charge on June 20 next forthwith to repay to the corporation the said sum of Two hundred and fifty thousand pounds together with all interest due and to become due thereon or on any judgment which may be recovered hereunder at the rate of eight per cent. per annum Provided however that should the interest rate of the Bank of England at any time be increased from the amount prevailing at the date hereof whilst the said loan or any part thereof is outstanding then the interest secured thereby is to be increased by a similar amount and that whatever may now or hereafter be the position between the borrowers and the guarantors as sureties the guarantors shall be considered and be liable as principal debtors for all moneys secured by the said charge and that the guarantors and their successors shall not be released nor shall their liability hereunder be affected by time being given to the borrowers or by the corporation omitting or neglecting to protect the security created hereby or by the said charge or by any other arrangement or dealing between the borrowers and the corporation in reference to the said security or by any other act omission matter or thing whatsoever whereby but for this provision the guarantors as sureties only would have been so released."

It is this document, and this document alone, which is the foundation of the claim of Mercantile Marine. The subsequent events in no way affect the question of the liability of Parent Trust; but for the sake of completeness they should be stated. Austin Friars did repay 100,000*l.* of the loan; and on two separate occasions in the year 1929 Mercantile Marine, at the request of Parent Trust, extended the time for repayment

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H. L. (E.) by Austin Friars of the balance of the loan for the time being unpaid, in consideration whereof Parent Trust covenanted with Mercantile Marine that the guarantee should remain in full force and effect in every respect for the reduced sum.

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Subsequently to these extensions of time it was for the first time discovered that the 275,000 shares in Iron Industries, Ltd., had not been validly issued, and that accordingly the debt, the payment of which Parent Trust had guaranteed, had never been secured on any of those 275,000 shares. On the one hand the fact that the 275,000 shares had not been validly issued is admitted by Mercantile Marine; on the other hand Parent Trust do not dispute that Mercantile Marine believed that those shares were validly issued, and that they had obtained a valid and effectual charge thereon.

In these circumstances it would seem that the legal rights and liabilities of these parties depend upon the true construction and effect of the agreement of guarantee; and indeed this view was not, I think, disputed by either side.

For Mercantile Marine it was contended (1.) that upon its true construction the agreement for guarantee merely states or postulates that there has been executed by Austin Friars a document or paper answering the description given—namely, a document or paper bearing the particular date and purporting to charge the scheduled shares or stating that they were charged; or (2.) alternatively that, if upon its true construction the agreement for guarantee required that the loan to Austin Friars should be a secured loan, then that requirement had been fulfilled, because the loan was in fact secured on the scheduled shares other than the 275,000 shares in Iron Industries, Ltd.

These arguments were advanced before your Lordships in all seriousness, but I confess that I find it difficult to treat them with equal gravity.

As regards the first alternative, the agreement according to its plain language does not merely assert the execution or existence of a document or piece of paper which answers the description given; it asserts the existence of a security, and of a security more particularly described—namely, a security

which consists of a charge on (amongst other shares) the 275,000 shares in Iron Industries, Ltd. This is the plain meaning of the words used : and an appreciation of this plain meaning destroys also the alternative contention, which can only be founded upon the view that nothing is asserted beyond the fact that Austin Friars have given some security.

Once it is realized that the debt which Parent Trust are undertaking to guarantee is a debt described as a debt the repayment of which by the principal debtor is secured by a charge on (amongst other shares) the 275,000 shares in Iron Industries, Ltd., the case (apart from the question of estoppel, to which I will refer) becomes in my opinion a simple one.

It is not a case, as Bennett J. seems to have treated it, of seeking to imply a condition, the implication of which is alleged to be inconsistent with other provisions in the document. In other words, as Romer L.J. said, it is not a case of Parent Trust being released from a contractual engagement. It is a case of an attempt to impose upon them a liability which they have never undertaken. The only debt, the repayment of which by the principal debtor they undertook to guarantee, was a debt secured by a charge on the 275,000 shares in Iron Industries, Ltd., and a debt so secured never in fact existed. The language of Knight Bruce L.J. in *Evans v. Bremridge* (1) may well be applied to the present litigants. In that case it was sought to make a surety liable who became a surety on the footing that a co-surety would join in the covenant with him. The co-surety had not done so, and the surety was held to be under no liability. As the Lord Justice truly said : " The defendants seek to charge the plaintiff with "a contract, into which he did not enter."

The alleged liability of Parent Trust having never existed, the appellants cannot derive assistance from the concluding words of the agreement which purport to provide that the liability of Parent Trust shall not be affected by the happening of the events therein specified.

From these conclusions Mercantile Marine seek to escape by

(1) 8 De G. M. & G. 100, 108.

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H. L. (E.) relying upon the doctrine of estoppel by recital in a deed. They contend that the recital which, on this view of the case, alleges that the debt of the principal debtor is secured by a charge on 275,000 shares in Iron Industries, Ltd., estops Parent Trust from alleging that the debt was not so secured; and that the result of applying this rule of evidence is that on the evidence in the case it is impossible to say that Parent Trust is free from liability.

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My Lords, in support of this view various authorities were cited, commencing with *Lainson v. Tremere*. (1) That was a case decided at common law on demurrer. In an action on a bond the condition of which was stated to be the payment of the rent of 170*l.* under a certain indenture of lease, the defendant pleaded that the rent reserved by the lease was 140*l.* and that he had paid that sum under the lease. The plaintiff made replication that the defendant had not paid the 170*l.* mentioned in the condition. On demurrer to that replication, the replication was held to be good, Lord Denman stating that in a Court of law the obligor was estopped from saying that the rent was not 170*l.* a year, and that upon the pleadings the defendant could not get rid of the estoppel with the result that there must be judgment for the plaintiff. How the difference between the two documents arose or which was the correct sum in fact is not stated. If, however, that decision is relied upon as applicable to a case of a mis-statement arising from mutual mistake, or as an authority for the proposition that in all circumstances statements in deeds estop all parties to the deed from ever alleging and proving the true facts, I would not, speaking for myself, be prepared to accept it as authoritative at the present day. Indeed, if it were, serious inroads might be made in the jurisdiction to rectify deeds.

Later decisions, however, put the matter on what seems to be the sounder basis. In *Young v. Raincock* (2) Coltman J. said: "Where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement

(1) 1 A. & E. 792.

(2) 7 C. B. 310, 338.

"of those facts, though but in the way of recital, shall estop the parties to aver the contrary." So, too, in *Stroughill v. Buck* (1) a recital in a deed between the plaintiff and defendant that money had been advanced by the defendant to one Ogle was held to be the language of the defendant only and not to estop the plaintiff from proving that no money had been so advanced: and it was stated that where a recital is intended to be an agreement of both parties to admit a fact it estops both parties; but it is a question of construction whether the recital is so intended.

My Lords, approaching this document from that angle I find no difficulty in saying that Parent Trust are in no way estopped. There is no trace in the language of the document of any agreement that a particular state of facts shall, whether true or not, be an admitted state of facts, or that the contract shall be based on that admission. The recital is a statement as to matters which would normally be within the knowledge of Mercantile Marine and not within the knowledge of Parent Trust, namely, that Mercantile Marine had made a loan to Austin Friars and had obtained from Austin Friars the stated security. There is nothing before us to suggest that Parent Trust were present when those transactions took place. It is no doubt true that Parent Trust requested Mercantile Marine to make the loan on the stated security; but that fact does not make the recital in any way the statement of Parent Trust, or an assertion by them that there was a charge on the 275,000 shares. It is from first to last a statement by Mercantile Marine that they have complied with a request of Parent Trust, i.e., a statement by Mercantile Marine that they have advanced 250,000*l.* to Austin Friars on the security of the shares specified in the schedule, which include the 275,000 shares in Iron Industries, Ltd. There is nothing to estop Parent Trust from asserting the non-existence of a charge on those shares.

For the reasons which I have endeavoured to indicate I agree with the decision and reasoning of the Court of Appeal, and I would dismiss this appeal with costs.

(1) 14 Q. B. 781.

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H. L. (E.) In these circumstances, the subsidiary questions need not be discussed.

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LORD MAUGHAM. My Lords, the facts in this appeal have been sufficiently stated in the opinion of my noble and learned friend Lord Russell of Killowen and it is unnecessary to repeat them. As he has pointed out the appellants raised two main points on the appeal, apart from a third point which arose on the construction and effect of the final clause of the guarantee of March 20, 1929. My Lords, on these contentions I do not think I can usefully add anything to that which has been said by my noble and learned friend Lord Wright in delivering the leading judgment in the Court of Appeal and by my noble and learned friend opposite in the opinion to which I have referred. There was, however, yet another point raised by the appellants, namely, the contention setting up against the Parent Trust and Finance Co., Ltd., and their liquidator, an estoppel by deed. Relying on the recital in the guarantee which was to the effect that the Mercantile Marine Finance Corporation, Ltd. (the guaranteed company), had at the request of the Parent Trust and Finance Co. (the guarantors) advanced to the borrowers (the Austin Friars Trust, Ltd.) the sum of 250,000*l.* on the security of a charge dated March 20, 1929, on the shares, particulars of which were set out in the schedule to the deed, they contended that the Parent Trust was estopped from alleging that the said loan was not secured as stated in the recital or that the charge was in any respect ineffective. A number of authorities were referred to in support of this contention. It is a point of considerable general importance, and I hope your Lordships will pardon me if I examine the particular doctrine of estoppel invoked in this case with a little elaboration.

My Lords, it is, I think, worth pointing out that for over two hundred years a recital in a deed was not considered to be so direct an affirmation as to amount to an estoppel (Co. Litt. 352 ; Law, or a Discourse thereof, by Sir H. Finch (1678), p. 33). This doctrine was not distinctly overruled till the year

1834, when, in the cases of *Lainson v. Tremere* (1) and *Bowman v. Taylor* (2), it was held to be unsound. Both cases were argued on demurrer, and there was therefore no statement of the facts beyond that contained in the pleadings. In *Lainson v. Tremere* (1) the action was on a bond for 1000*l.* The condition recited that by a lease of even date between the plaintiff's testator and the defendant the testator demised premises to the defendant at the yearly rent of 170*l.*, and the condition itself was payment to the testator of that sum. This figure of 170*l.* was no doubt a mistake, for the reddendum in the lease was for a sum of 140*l.* only. The plaintiff, however, sued not on the lease but on the bond, and the Court held that the defendant was estopped by the recital in the bond from saying that the rent was not 170*l.* a year. The plaintiff accordingly was held entitled to judgment on that footing—a very remarkable result.

The case of *Bowman v. Taylor* (2), which was decided in the same year, calls for a little examination. The estoppel was founded on a recital in an indenture of May 10, 1824, containing a grant by the plaintiff of a licence to the defendants to use an invention for which the plaintiff had obtained letters patent in the form in use in 1824. The action was for breach of a covenant by the defendant to pay certain royalties. The defendant pleaded (amongst other things) that the plaintiff was not the true and first inventor and that the supposed invention was not a new invention. The deed, however, recited that the plaintiff had invented improvements and obtained letters patent for them, and the defendants were held estopped from denying that the plaintiff was the true and first inventor. There was accordingly judgment for the plaintiff. My Lords, I do not doubt the correctness of the result; but I do doubt whether the recital could properly be taken to be a statement on behalf of the licensee who could have had little knowledge as to possible anticipations of the invention. The decision may be explained on the ground that the deed was entered into on the footing that the recital, whether true or not, must be taken during the

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(1) 1 A. & E. 792.

(2) 2 A. & E. 278.

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continuance of the licence as true. The question of estoppel in relation to licences to use a patent has been the subject since 1834 of nearly a score of decisions in varying circumstances, of which *Clark v. Adie* (1) is perhaps the most authoritative. The decision of the House of Lords in that case was not based on the narrow ground adopted in *Bowman v. Taylor* (2), but on the much wider ground that the licensee of a patent right is bound on the same principle and in the same way as a tenant who has taken a lease of lands from another and who is estopped during the lease from denying his landlord's title.

It seems to be clear that having so recently adopted the view that a recital might operate as an estoppel, the Courts had not at that time worked out the qualifications which might prove to be necessary unless great injustice was to result. Subsequent cases laid down that the recital must relate to specific facts, must be certain, clear and unambiguous, and would not avail persons who were not parties or privies to the deed. In *Stroughill v. Buck* (3), following *Young v. Raincock* (4), another and a very important qualification was laid down. Pattenon J., in his judgment in *Stroughill v. Buck* (3), stated it thus: "When a recital is intended to "be a statement which all the parties to the deed have "mutually agreed to admit as true, it is an estoppel upon all. "But, when it is intended to be the statement of one party "only, the estoppel is confined to that party, and the intention "is to be gathered from construing the instrument." My Lords, in agreement with the Court of Appeal and with the opinion of my noble and learned friend Lord Russell of Killowen I think that this statement of the law is correct; and I also agree with them in coming to the conclusion that upon the true construction of the recital contained in the guarantee of March 20, 1929, read in conjunction with the charge of even date mentioned in the recital, the fair inference is that the recital is intended to be the statement of the Mercantile Marine and not to be that of the Parent Trust

(1) (1877) 2 App. Cas. 423.
 (2) 2 A. & E. 278.

(3) 14 Q. B. 781, 787.
 (4) 7 C. B. 310.

and Finance Co. The latter accordingly are not estopped from relying on the admitted fact that the charge was not secured on the 275,000 fully paid shares of the Iron Industries, Ltd., for the simple reason that these shares had never been issued.

My Lords, this conclusion is sufficient for the determination of the present appeal; but it is easy to imagine a deed so framed, perhaps by inadvertence, that such a conclusion, as a mere matter of construction, might be impossible even in a case of a common mistake; and it seems to me to be desirable to point out that there was another road, not depending on a perhaps ill-framed recital, leading more certainly in such a case to the same result.

Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies and therefore as not admitting any contradictory proof. It is important to observe that this is a rule of common law, though it may be noted that an exception arises when the deed is fraudulent or illegal. The position in equity is and was always different in this respect, that where there are proper grounds for rectifying a deed, e.g., because it is based upon a common mistake of fact, then to the extent of the rectification there can plainly be no estoppel based on the original form of the instrument. It is at least equally clear that in equity a party to a deed could not set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission or in reliance on an untrue statement or an untrue recital induced by his own representation, whether innocent or otherwise, to the other party. Authority is scarcely needed for so clear a consequence of a rectification order or an admitted or proved right to such an order. The well known rule of the Chancery Courts in regard to a receipt clause in a deed not effecting an estoppel if the money has not in fact been paid is a good illustration of the equity view: see the cases cited in Halsbury's Laws of England, 2nd ed., vol. 10, p. 289. The decision of Lord Romilly in *Brooke v. Haymes* (1) is

(1) L. R. 6 Eq. 25.

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H. L. (E.) even more closely in point, and it may be added that the statement of the law in that case appears never to have been doubted. The headnote begins as follows: "A party
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 ———
 "to a deed is not estopped in equity from averring against
 "or offering evidence to controvert a recital therein contrary
 "to the fact, which has been introduced into the deed by
 "mistake of fact, and not through fraud or deception on his
 "part." In a simple case of this kind it would be unnecessary, as that case shows, to counterclaim for rectification, though in a case of any complexity it would certainly be desirable to do so.

Since the Judicature Act, 1873, the rule in equity must prevail. It would seem to be clear that the case of *Lainson v. Tremere* (1), if it were tried on the facts at the present day, would be differently decided, and that in all those cases where the party against whom an estoppel by deed is sought to be raised has a right to rectification which would, so to speak, destroy the alleged estoppel, or a right to rescission on equitable grounds, he has an answer to the estoppel which would not have been open to him at common law. In the present case, apart from the ground on which the estoppel was held to fail in the Court of Appeal, I have myself no doubt that the same result might have been reached on the simple ground that the recital was inserted, so far as the shares in question were concerned, by a common mistake not alleged to have been induced by the Parent Trust and Finance Co.

My Lords, as I have said, I agree in all respects with the decision and the reasoning of the Court of Appeal, and I concur in the proposed motion.

LORD ROCHE. My Lords, I concur.

Appeal dismissed.

Solicitors for appellants: *Simmons & Simmons.*

Solicitors for respondent: *Linklaters & Paines.*

[HOUSE OF LORDS.]

ADMIRALTY COMMISSIONERS . . . APPELLANTS ; H. L. (E.)*

AND

VALVERDA (OWNERS) RESPONDENTS.

1937

Nov. 16, 18,
19, 22 ;
Dec. 22.

Ship—Salvage—Salvage services by H.M. ships—Contract to render salvage—Validity—Powers of House to overrule long established course of decisions—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557—Merchant Shipping (Salvage) Act, 1916 (6 & 7 Geo. 5, c. 41), s. 1.

By s. 557, sub-s. 1, of the Merchant Shipping Act, 1894 :
 "Where salvage services are rendered by any ship belonging to
 "[His] Majesty no claim shall be allowed for any loss,
 "damage, or risk caused to the ship or her stores, tackle, or
 "furniture, or for the use of any stores or other articles belonging
 "to [His] Majesty, supplied in order to effect those services, or
 "for any other expense or loss sustained by [His] Majesty by
 "reason of that service. . . ."

The owners of the motor vessel *Valverda*, being informed that she was on fire, made a contract in writing with the Admiralty that warships belonging to His Majesty should render salvage services. Such services, including towage, were in fact rendered. On a claim by the Admiralty in respect of those services :—

Held, (1.) that the agreement as a salvage agreement could not override s. 557, which was in its terms imperative and prohibitory and could not be the subject of contracting out or of waiver ; (2.) that the agreement on its true construction did not exclude or waive the provisions of s. 557 ; (3.) that the agreement, notwithstanding the stipulation it contained for remuneration in the event of non-success, was a salvage agreement, and not an agreement for work and labour outside s. 557. The *Kate B. Jones* [1892] P. 366 and *The Edenmore* [1893] P. 79 approved ; (4.) that s. 557 was intended to exclude, and on its true construction did exclude, all claims whatsoever by the Admiralty, including claims for the use of the King's ship as a salving instrument.

Per Lord Wright : While the House of Lords has power to overrule even a long established course of decisions, provided it has not itself determined the question, it will in general adopt this course only in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law.

Decision of the Court of Appeal [1937] 1 K. B. 745 affirmed.

* *Present* : LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD MAUGHAM, and LORD ROCHE.

H. L. (E.)

APPEAL from a decision of the Court of Appeal on a special case stated by an arbitrator. (1)

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ADMIRALTY
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The respondents to the appeal were the owners of the motor vessel *Valverda* on which, on January 21, 1935, while on a voyage from Curaçao to Land's End, a fire broke out. An S.O.S. signal for assistance was sent out, and in response thereto H.M.S. *Frobisher* and H.M.S. *Guardian* came up, and the *Frobisher* towed the *Valverda* some 800 or 900 miles to Bermuda, arriving there on February 1. Subsequently an agreement, being the Admiralty standard form of salvage agreement, was signed by representatives of the owners and of the Admiralty, the material clauses of which were as follows :—

1. "The Admiralty agree to use such endeavours as they "or their officers may in their absolute discretion think fit to "salve or assist the ship *Valverda* and her cargo and freight if "any, and the Master (or Owner) hereby engages the services "of the Admiralty for such purposes. . . . It is hereby agreed "that all the provisions of this agreement shall apply [to services "already rendered] as if they had been wholly rendered after "the signing of this agreement.

3. "The remuneration under this agreement for any "services rendered shall, unless agreed with the Admiralty, be "fixed by arbitration in London, as hereinafter provided.

4. "The remuneration shall, if the services are successful "or beneficial, consist of a reasonable amount of salvage.

5. "If the services are not successful or beneficial, then "the actual out-of-pocket expenses incurred by or on behalf "of the Admiralty in the endeavours to salve or assist the said "ship and her cargo and freight, together with compensation "not exceeding 350*l.* for any loss or damage incurred in such "endeavours, shall be the measure of the remuneration "payable to the Admiralty under this agreement, but there "shall not be included in the said expenses or compensation "any charge for the use of any ship or tug belonging to His "Majesty.

6. "The Admiralty shall, after the termination of the "services, notify the Committee of Lloyd's of the amount for

"which the Admiralty may require security to be given. . . . H. L. (E.)

7. "Pending the completion of the security as aforesaid
 "the Admiralty shall have a maritime lien on the property
 "salved for their remuneration and the Master (or Owner)
 "hereby undertakes not to remove or to permit the removal
 "without the consent of the Admiralty of the property salved
 "or any part thereof from the port of or the place—
 "of safety to which the property is taken or at which it is left
 "by the Admiralty on the completion of the salvage services
 "until security has been given to the satisfaction of the
 "Committee of Lloyd's. In consideration of this undertaking
 "the Admiralty engage not to arrest or detain the property
 "salved unless the security be not given within 14 days of the
 "termination of the services or the Admiralty have reason to
 "believe that the removal of the property salved is contem-
 "plated contrary to the above undertaking.

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8. "The amount of the remuneration payable under
 "this agreement, and any other question which may arise out
 "of this agreement, shall be referred to the sole arbitration of
 "an arbitrator to be appointed by the Committee of Lloyd's."

The arbitrator to whom the claim for a salvage award was referred—Sir Norman Raeburn K.C.—found as a fact that the agreement above mentioned was entered into voluntarily with full knowledge that the *Frobisher* and the *Guardian* were assisting the *Valverda*; and further that the services rendered by the *Frobisher* and the *Guardian* were difficult and dangerous and involved serious risk to those vessels.

The owners admitted that salvage services were rendered by the *Frobisher* and the *Guardian* and also by the *Sandboy* and the *Creole*; they further admitted that the Admiralty were entitled to claim salvage in respect of the services of the *Sandboy* and the *Creole*, which were tugs or vessels "specially "equipped with salvage plant " within s. 1 of the Merchant Shipping (Salvage) Act, 1916, but they denied that any salvage could be claimed in respect of the services of the *Frobisher* and the *Guardian*. Claims by the officers and crews were, however, admitted.

The Admiralty contended that by virtue of the terms of

H. L. (E.) the contract of January 25, 1935, they were entitled to claim in respect of all the ships.

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The arbitrator held that the Admiralty were entitled to salvage in respect of all the ships, and awarded 11,000*l.* In the alternative, if the Court should be of opinion that the Admiralty were not entitled in respect of the *Frobisher* and *Guardian*, he awarded 6500*l.*

Branson J. upheld the arbitrator's award and held that, notwithstanding the provisions of s. 557 of the Merchant Shipping Act, 1894 (1), it was open to the parties by a contract otherwise valid to contract out of the provisions of that section and for the owners to waive the benefit thereby conferred upon them.

On appeal, the Court of Appeal (Slesser and Scott L.JJ., Greer L.J. dissenting) held that it was not open to the parties by a contract otherwise valid to contract out of the provisions of s. 557.

The Admiralty Commissioners appealed to this House.

Sir Donald Somervell A.-G., G. St. C. Pilcher K.C., and Owen L. Bateson for the appellants. The question is: Do the words of s. 557, sub-s. 1, of the Merchant Shipping Act, 1894 (1), apply to a claim for salvage remuneration which arises out of an agreement between the parties as it does in this case? We submit that the section deals only with claims under maritime law. As is said in *Kennedy on Civil Salvage*, 3rd

(1) Merchant Shipping Act, 1894, s. 557, sub-s. 1: "Where 'salvage services are rendered by 'any ship belonging to [His] 'Majesty or by the commander 'or crew thereof, no claim shall 'be allowed for any loss, damage, 'or risk caused to the ship or her 'stores, tackle, or furniture, 'or for the use of any stores 'or other articles belonging to '[His] Majesty, supplied in order 'to effect those services, or for 'any other expense or loss sustained by [His] Majesty by 'reason of that service. . . ."

Merchant Shipping (Salvage) Act, 1916, s. 1: "Where salvage 'services are rendered by any 'ship belonging to His Majesty 'and that ship is a ship specially 'equipped with salvage plant, or 'is a tug, the Admiralty shall, 'notwithstanding anything contained in s. 557 of the Merchant Shipping Act, 1894, be entitled 'to claim salvage on behalf of 'His Majesty for such services, 'and shall have the same rights 'and remedies as if the ship 'rendering such services did not 'belong to His Majesty."

ed., p. 4: "Whilst the Court of Admiralty is not precluded from entertaining a salvage claim because the nature of the service or the amount of its reward has been fixed by agreement, the right of the salvor is, essentially, independent of contract. It is enough that the services in respect of which he claims reward have been rendered at a time when the property to which they have been rendered is so circumstanced that a prudent owner would accept them." As the present claim was not under maritime law, but under the contract entered into, it could have been sued for in the King's Bench Division for the work and labour done. The word "claim" in s. 557 means and means only a claim under maritime law; it thus has no application to a claim made independently of maritime law. Here, moreover, the fundamental element in salvage is absent—namely, the saving of the res: see per Brett M.R. in *The Renpor*. (1) In *The Hestia* (2) Bruce J. said (3) that "salvage claims do not rest upon contract. Where property has been salvaged from sea perils, and the claimants have effected the salvage, or have contributed to the salvage, the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or helped to save. No doubt the parties may by contract determine the amount to be paid; but the right to salvage is in no way dependent upon contract, and may exist, and frequently does exist, in the absence of any express contract, or of any circumstances to raise an implied contract." In that case the agreement entered into merely fixed the amount of the reward, if the services were successful. All other conditions of maritime law were left untouched. In *The Lepanto* (4) Jeune J. emphasized the necessity in salvage cases of the principle "no cure, no pay." That being so, the agreement in this case is not a salvage agreement, but one for work and labour—namely, towage. In *The Solway Prince* (5) the contract entered into, which was not dependent on success, precluded the plaintiffs asserting a

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(1) (1883) 8 P. D. 115, 118.

(2) [1895] P. 193.

(3) Ibid. 199.

(4) [1892] P. 122.

(5) [1896] P. 120.

H. L. (E.) maritime lien on the vessel and claiming salvage remuneration.
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 ADMIRALTY contend—namely, that an agreement in which the “no cure,
 COMMIS- “no pay” is departed from is not a salvage agreement.
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 claims for salvage services rendered by ships belonging to His
 Majesty, that would help me.]

In the Court of Appeal both Slessor L.J. and Scott L.J. appeared to think that before that Act there was a doubt whether the Admiralty could claim; but in *H.M.S. Thetis* (1) a claim was allowed, as it was also in *The Lustre* (2) and *The Ewell Grove*. (3) In *The Iodine* (4) Dr. Lushington said (5): “I widely disagree with the argument which has been employed “on behalf of the owners of the cargo, and I should lay down “what I consider to be a new position, if I pronounced against “the claim for salvage, and held that it was a duty incumbent “upon Her Majesty’s steam vessels to render important services “of this description without any remuneration at all. I believe “if I were to lay down any such rule, no greater mischief could “be done to the shipping interests of this country.” We contend that the policy of the Act of 1854, now the Act of 1894, was to confer a benefit upon shipowners in the case of salvage services being rendered independently of contract, that is, under maritime law. Where persons of full age and understanding make a contract for work and labour, why should they not be held to it? The effect of s. 557 upon an agreement such as this has never been considered. Salvage claims are primarily not *ex contractu*. Further, it will be noted that s. 557 does not say that no salvage claim shall be allowed; it simply provides that “no claim shall be allowed for any loss, damage, or risk “caused to the ship or her stores, tackle or furniture “or for any other expense or loss sustained by [His] Majesty “by reason of that service.” While there is there an express prohibition of claims for use of stores there is none in respect

(1) (1833) 3 Hagg. Adm. 14.

(4) (1844) 3 Notes of Cases, 140.

(2) (1834) 3 Hagg. Adm. 154.

(5) *Ibid.* 144.

(3) (1835) 3 Hagg. Adm. 209.

of the use of the ship. The Admiralty is therefore entitled to payment for this. H. L. (E.)

[They also cited *The Solway Prince* (1); *The Stiklestad* (2); and *The Goulandris*. (3)

Carpmael K.C. and *Willmer* for the respondents. A salvage award is made to reward the salvor for the use of his vessel. In early days the Admiralty were held entitled to recover out-of-pocket expenses in salving a vessel. Later it was decided that if the King's ship was sent out to assist a vessel in distress and sustained damage in so doing, the Admiralty could claim in respect of that damage: *The Lustre*. (4) A tendency on the part of the Admiralty to claim still more becoming manifest, the Merchant Shipping Act, 1854, was passed providing that such claims were not maintainable, and since then there is an unbroken line of authority that salvage claims by the Admiralty are barred except in the case of vessels specially equipped with salvage plant, or tugs, as provided by the Merchant Shipping (Salvage) Act, 1916: see *The Dalhousie* (5); *The Cybele*. (6) See, too, the argument of the Attorney-General in *China Navigation Co. v. Attorney-General*. (7) This view has been taken by all the text-writers on the subject: see Kennedy's Civil Salvage, 3rd ed., p. 131; Carver's Carriage by Sea, 7th ed., s. 332 n. (1); Temperley's Merchant Shipping Acts, 4th ed., p. 363. It is said, however, on behalf of the Admiralty that the agreement which was entered into provides not for salvage in the true sense but for work and labour, and therefore is enforceable.

[LORD ATKIN. What was the point of entering into this agreement if, as you contend, such an agreement has no legal validity?]

Whatever the reason may have been it was an attempt to escape from the words of s. 557, which in terms excludes any claim for salvage by the Admiralty with the exception of services rendered by specially equipped vessels and tugs, as provided by s. 1 of the Merchant Shipping (Salvage) Act, 1916.

(1) [1896] P. 120.

(2) [1926] P. 205.

(3) [1927] P. 182.

(4) 3 Hagg. Adm. 154.

(5) (1875) 1 P. D. 271n.

(6) (1878) 3 P. D. 8.

(7) [1932] 2 K. B. 197, 207, 208.

H. L. (E.) The House took time for consideration.

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1937. Dec. 22. LORD ATKIN. My Lords, in this case I have had the opportunity of reading the opinion which my noble and learned friend Lord Wright is about to deliver. I entirely agree with it, and I have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, I have had the same advantage, and I also concur.

LORD WRIGHT. My Lords, the appellants, whom I shall refer to as the Admiralty, obtained from Sir Norman Raeburn K.C. an award in their favour of 11,000*l.* for salvage services rendered to the respondents' motor vessel *Valverda*, her cargo and freight, by vessels belonging to His Majesty. The award was in the form of a special case subject to the opinion of the Court on the question of law stated in it. If the Court should answer that question in a sense contrary to the opinion of the arbitrator, the award was to be for 6500*l.* Branson J., before whom the special case came, took the same view as the arbitrator, but his decision was reversed by the Court of Appeal by a majority, composed of Slesser and Scott L.JJ., Greer L.J. dissenting.

The central question in the case is the meaning and effect of s. 557, sub-s. 1, of the Merchant Shipping Act, 1894. This section is in the following terms: "Where salvage services "are rendered by any ship belonging to [His] Majesty or by "the commander or crew thereof, no claim shall be allowed "for any loss, damage, or risk caused to the ship or her stores, "tackle, or furniture, or for the use of any stores or other "articles belonging to [His] Majesty, supplied in order to "effect those services, or for any other expense or loss "sustained by [His] Majesty by reason of that service, and "no claim for salvage services by the commander or crew, "or part of the crew of any of [His] Majesty's ships shall be "finally adjudicated upon, unless the consent of the Admiralty "to the prosecution of that claim is proved."

This provision was amended by the Merchant Shipping

(Salvage) Act, 1916, which was described in the preamble as "An Act to authorise the recovery of salvage in respect of "services rendered by certain ships belonging to His Majesty." Sect. 1 of that Act provided as follows: "Where salvage "services are rendered by any ship belonging to His Majesty "and that ship is a ship specially equipped with salvage plant, "or is a tug, the Admiralty shall, notwithstanding anything "contained in section Five hundred and fifty-seven of the "Merchant Shipping Act, 1894, be entitled to claim salvage "on behalf of His Majesty for such services, and shall have "the same rights and remedies as if the ship rendering such "services did not belong to His Majesty."

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The Admiralty's primary contention was that the operation of s. 557 was excluded and superseded by a salvage agreement entered into between the Admiralty and the respondents. They alternatively contended that the agreement was not for salvage but for work and labour, and took the case out of the law of maritime salvage, so that the section did not apply at all. In the further alternative they contended that the section did not prohibit all claims for salvage, but merely excluded certain specific elements, leaving the Admiralty entitled to claim in respect of anything not expressly excluded, in particular for the use or services of the vessels. The dispute did not affect the claims in respect of such of the Admiralty vessels employed in the salvage as fell within the amending Act of 1916 or the claims of the officers and crews of all the vessels employed. These claims were not contested and were covered by the alternative award of 6500*l*.

The *Valverda* is a motor vessel of 8806 tons gross register. She was at the time of the salvage services on a voyage from Curaçao to Land's End for orders with a cargo of petroleum. Ship, cargo and freight were valued at 92,616*l*. in all. On January 21, 1935, when she was in about Lat. 25° 17 N., Long. 52° 00 W., a fire broke out in her engine-room. She sent out by wireless an S.O.S. signal. H.M.S. *Frobisher*, a cruiser of 9860 tons displacement, proceeded in answer to the signal, reached her on January 22, 1935, took her in tow as she

H. L. (E.) was helpless, and towed her to Bermuda, a distance of about 900 miles. The *Guardian*, a smaller cruiser of 3050 tons, also came up to assist and rendered some help. At a later stage salvage services were also rendered by two craft within the description of the Act of 1916, and some assistance was given by a Fleet Auxiliary, the *Orangeleaf*. The arbitrator found that the services were difficult and dangerous and involved serious risk to the salving vessels (save the Fleet Auxiliary), and their personnel. On January 25, 1935, the respondents in England signed the Admiralty Standard Form of Salvage Agreement, which was also signed on behalf of the Admiralty. The parties were by then fully apprised by wireless of the position of the *Valverda* and of the names and character of His Majesty's vessels which were rendering the salvage services. The respondents made at the time no suggestion that any distinction should be drawn between the classes of Admiralty vessels which might participate in the services.

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The arbitrator found that the Admiralty incurred expenses, which were reasonable expenses, in rendering the salvage services, amounting to 4770*l.* 19*s.* 2*d.* These expenses consisted of extra consumption of fuel and stores, of the value of gear and wires lost, of the cost of repairing damage sustained, and other matters in connection with the salving vessels, which, in addition to the two cruisers and the *Orangeleaf*, included also H.M.S. *Sandboy* and the yard craft *Creole*. Of the 4770*l.* 19*s.* 2*d.*, 864*l.* 0*s.* 3*d.* was for repairs to the *Sandboy* and 264*l.* 0*s.* 10*d.* was for extra fuel and stores consumed by the *Sandboy* and *Creole*. The arbitrator found that the *Sandboy* and *Creole* were vessels within the Act of 1916, whereas the *Frobisher*, *Guardian* and *Orangeleaf* were not. It was common ground that the Admiralty in their claim were representing also the claims of the officers and crews of the salving vessels, and were trustees pro tanto on their behalf of any award, and would apportion and distribute the appropriate amount among them according to the Admiralty Rules in that regard. The necessary permission of the Admiralty for the officers and crews to claim was produced de bene esse to the arbitrator. The question stated by the

arbitrator was whether the Admiralty were entitled in law to salvage remuneration in respect of the services of H.M.S. *Frobisher*, H.M.S. *Guardian* and R.F.A. *Orangeleaf*. He made his award of 11,000*l.* on the footing that they were so entitled. His alternative award of 6500*l.* was on the footing that they were not.

The substance of the salvage agreement which was signed may be briefly summarized. It was on the Admiralty Standard Form of Salvage Agreement, described on its face as D.46 (a dockyard form) established October, 1917, revised June, 1934. It bears no relation to, and contains no reference to, s. 557. It was obviously and admittedly prepared in view, and for purposes of, the Act of 1916. Under the agreement the Admiralty agreed to use such endeavours as they or their officers might in their absolute discretion think fit to save or assist the ship *Valverda* and her cargo and freight, and the owners engaged the services of the Admiralty for such purposes. It was stipulated that the agreement should relate back to the services already rendered before its execution. The remuneration, if not agreed, was to be fixed by arbitration in accordance with the provisions particularized in the relevant sections of the agreement, and was to consist, if the services were successful or beneficial, of a reasonable amount of salvage. Provision was made for the owners giving security on the termination of the service to the satisfaction of the Committee of Lloyd's, and, pending the completion of the security, the Admiralty were to have a maritime lien on the property salvaged for their remuneration. Clause 5 contained provisions which were to apply if the services were not successful or beneficial. In that event the actual out-of-pocket expenses incurred by or on behalf of the Admiralty in the endeavours to save the ship, cargo and freight, together with compensation not exceeding 350*l.* for any loss or damage incurred in such endeavours, was to be the measure of the remuneration to the Admiralty, but there was not to be included in the expenses or compensation any charge for the use of any ship or tug belonging to His Majesty.

It was strenuously contended on behalf of the Admiralty

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that this agreement, which was deliberately entered into by the respondents with full knowledge of all the material facts, overrode the provisions of s. 557. It was pointed out that the beneficial, onerous and expensive services were rendered in consideration of the respondents' undertakings. His Majesty's vessels, even if by statute bound to stand by, were under no legal obligation to render salvage, and might have left the salvage operations to other vessels. It is true that the Admiralty in the King's Regulations have strongly inculcated on the officers and crews of His Majesty's ships that it is their duty to render assistance to vessels in distress, but that is a moral obligation and gives no legal rights to a shipowner, whereas the agreement did give legal rights to the respondents, but only in consideration of the corresponding legal rights given to the Admiralty. It was urged that the respondents had "contracted out" of the statute or had waived its benefit, and that the agreement was enforceable according to its apparent tenor in the events which happened. As the services had been successful and beneficial, the Admiralty, it was urged, were entitled to a reasonable amount of salvage, as if they were private salvors free from any prohibition or limitation under s. 557. No distinction could be, or was, drawn between the cruisers and the tug. All the salving vessels were to have the same rights and remedies as if they did not belong to His Majesty. Such were the submissions which found favour with the arbitrator, with Branson J. and with Greer L.J. But with all the deference due to such eminent authorities I cannot agree with their conclusion. Such a conclusion would, in addition to the reasons I shall next state, afford a simple and easy way of evading or nullifying s. 557 and make it a matter of wonder why the Act of 1916 was necessary. A binding salvage agreement may be entered into (subject, no doubt, to a certain jurisdiction over it vested in the Court of Admiralty) without the formality of any writing or Standard Form. Thus it may be made by word of mouth between the commander of the King's ship and the master of the ship in distress at the very time and place of the salvage service. The operation of the statute might thus be excluded in every case.

But the section is, in my judgment, clearly in its terms imperative and prohibitory: "No claim shall be allowed." It falls into two parts, both equally imperative, the first portion which is general, the second which applies only to claims by the commander or crew, and requires for such claims the consent of the Admiralty. Both equally, in my opinion, are provisions dictated by public policy, and are imposed not for the benefit of any individuals or body of individuals, but for considerations of State. The latter provision was apparently inserted to prevent improper claims by officers and crews, such as that which in 1838 invoked the censure of the Court in *The Rapid*. (1) That provision could not, in my opinion, be the subject of contracting out or waiver. The object and policy of the former provision are more difficult to define with any certainty, as will be discussed later. But it is clearly based on public considerations. Wherever there is a question whether there can be contracting out or waiver of statutory provisions, the problem must be solved on a consideration of the scope and policy of the particular statute. Little help can in general be derived from other statutes. Thus statutes which deal with procedural or evidential requirements, such as the Statute of Frauds or the Public Authorities Protection Act, 1893, may in some cases be the subject of waiver, though even in Acts of that character considerations of the purpose of the particular statute may exclude waiver or contracting out. But such Acts are far removed from an imperative public enactment such as s. 557, which governs the position of a State Department and State servants. The case of *Griffiths v. Earl of Dudley* (2) was relied on as a case in which a Court held that contracting out of a statute was legitimate and valid. I confess to some doubts whether the case was well decided, but it is not necessary to discuss that further here, because it was a case very unlike the present. The Act in question there, the Employers' Liability Act, 1880, was obviously passed for the benefit of workmen. I am not concerned to say that the benefit of a statute may not be contracted out of or waived in

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(1) (1838) 3 Hagg. Adm. 419. (2) (1882) 9 Q. B. D. 357.

H. L. (E.) appropriate cases. All I need to say is that this, in my opinion, is not such a case.

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But I do not think that the agreement on its true construction involves the question. The agreement does not in terms purport to exclude or waive s. 557. I see no reason why any such intention should be implied. What is to be given as remuneration in the event of success or benefit is to be a reasonable amount of salvage. That imports, in my opinion, that the remuneration is to be ascertained in accordance with the principles which are applied in fixing salvage rewards according to maritime law. That the services were to be treated as salvage services is, I think, also clear from the stipulation for a maritime lien. A maritime lien cannot be created by contract. In my opinion this agreement must be construed as governed by the relevant rules of maritime salvage. In the particular case of salvage by His Majesty's ships, one rule which is applicable is that embodied in s. 557. I venture to quote in this context a sentence from the admirable judgment of Scott L.J., to which I have been much indebted: "What is there then in the language of the agreement to justify our interpreting it as intended to enlarge the Admiralty's rights, either in their own behalf or on behalf of officers and men, beyond the limits allowed by law, so as to give them a remuneration to which without an agreement they would have no right?" And I agree with his conclusion that all that the agreement stipulates for is such salvage remuneration as is "not barred by the conjoint operation of the two Acts of 1894 and 1916, and no more." I think no question of contracting out or waiver arises in fact or could in law arise.

This renders it necessary now to deal with the alternative contention. This is directly inconsistent with the first contention which I have rejected. The alternative contention is that s. 557 does not apply at all to this case because the services were not salvage services under the maritime law but were rendered under the agreement, which was not a salvage agreement but an agreement for work and labour. I have already sufficiently indicated a view that the agreement was

an agreement for salvage and that the services were salvage services within s. 557. The provisions for remuneration as salvage and for a maritime lien would be sufficient in themselves to establish this. Salvage must be voluntary in the sense that it is not rendered under a pre-existing obligation, but it is not deprived of the character of voluntariness merely because the salvor has made an agreement regulating (subject always to the jurisdiction of the Admiralty Court) the conditions under which he renders the salvage services. But I have to note one objection particularly relied on by the Admiralty. The objection is based on clause 5 of the agreement. That clause provides for a remuneration in the event of non-success. It is said to be inconsistent with the nature of salvage, which is necessarily on a "no cure, no pay" basis. Its presence, it is said, determines the character of the whole agreement and prevents it from being regarded as an agreement for salvage. This argument is, in my opinion, not only unsound in principle but contrary to well established decisions of the Admiralty Court. It was boldly contended that these decisions were wrong, in particular *The Kate B. Jones* (1) and *The Edenmore*. (2) In the former case Gorell Barnes J. was of opinion that the salvor would be entitled to some remuneration even in the event of failure, because he was in some respects an agent of the owner of the salvaged vessel, and accordingly he based his award on the principle that the risk of the entire loss of the salvor's expenditure, if unsuccessful, was a risk which the salvor there did not incur. But that did not lead the judge to treat the services as other than salvage services, though it did affect the amount of the salvage remuneration which was awarded. Similarly in *The Edenmore* (2) the same learned judge was inclined to the view that the agreement would entitle the salvors to some remuneration even if the services were not successful. But he held that the services were salvage services and made a salvage award, adding that it was very difficult to say what precise effect such a stipulation ought to have in reduction of the sum awarded when the services proved successful. I think the principles

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(1) [1892] P. 366.

(2) [1893] P. 79.

H. L. (E.) accepted by that very learned and experienced judge are sound. The stipulation for some payment in the event of failure is severable. It could not affect the position if the services were successful, save that it might properly be taken into account so as to reduce the amount of the award on the ground that the salvor was not taking the full risk of "no cure, no pay." In my judgment the services rendered to the *Valverda* by the Admiralty vessels were salvage services and the agreement was a salvage agreement, so that s. 557 applied and excluded the appellants' claim.

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But even so, the third point remains to be considered. This is that s. 557 does not exclude all claims for salvage, but only the specific claims enumerated in the section, and that there are other claims beyond these, or at least one important claim—namely, for the use or services of the King's ship as a salving instrument. It is conceded that a King's ship is not a profit-earning vessel. But all the same, it is said, she may properly be taken to have a value to the Admiralty reducible to terms of money, so that they can claim in respect of that value during the period in which the ship was occupied on, and appropriated to, the salvage service. The case, it was contended, was, if not identical with, at least similar to, the case where damages are awarded to the Admiralty for loss of time consequent on damage to a King's ship sustained in a collision due to the negligence of the defendants' servants. Such a case was discussed in *Admiralty Commissioners v. S.S. Chekiang* (1), where Lord Sumner, while admitting that such damages were claimable, pointed out the difficulties of estimating them. Sometimes, he said, "the value of the user may really be no more than that of floating accommodation for officers and crew, who have among other things to be kept under discipline and busy." On that view it may be said that so far as user of the vessels is concerned, the Admiralty in this case may have suffered no loss or no appreciable loss, so that this element might not affect the amount awarded. But the amount awarded is a matter for the arbitrator if he acts on correct principles, and the

Admiralty relied on the actual language of s. 557, which did not in terms, they said, prohibit all salvage claims by a King's ship, or in terms exclude a claim for use of the ship, though it excluded claims for use of stores, and claims for loss, damage or risk to the ship or her stores. They contended that damage or risk to the ship may be regarded as an element in salvage distinct in principle from user of the ship, and that the omission of any express reference to the use of the ship is not made good by the general words "any other "expense or loss," because these words refer to recoupment, whereas payment for use of the ship is a subject-matter of reward, nor could such general words make up for the significant omission of reference to the use of the ship. While it is true that the language of s. 557, merely on the literal meaning of the actual words, is not free from difficulty, I think that when the practical effect of the section is looked at its intention is clear, and that it is to exclude all claims for salvage by a King's ship. The enumeration of items or elements, coupled with the general words, was meant to be exhaustive. In fact, the use of the ship was not regarded as a separate element of claim. If items of loss and expense, out-of-pockets, consumption of stores, actual risk and so forth were excluded, a fortiori must the same be true of any reward for user. User is in truth a difficult idea when applied to non-profit-earning vessels, which like the cruisers are dedicated to public service, and for which the Admiralty are trustees for the nation, which is interested in salvage being rendered to the vessels in distress. To modern ideas this is not perhaps so obvious as it seems to have been in 1853. It is difficult now to see any decisive reason why the general body of taxpayers should bear the expense of salvage rather than the particular shipowners or underwriters who have benefited by it. The case is even less obvious when the ships salvaged are foreign or the underwriters are foreign in whole or in part. But so far as has been ascertained, until this case no one has contended that s. 557 left it open to the Admiralty to make any claim of any kind whatever for salvage services rendered by their ships. It has been consistently accepted

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H. L. (E.) by the Admiralty that they are barred from any claim for salvage, subject to the limited exception introduced by the Act of 1916. If the actual words of s. 557 were regarded as leaving the matter in doubt, the long sequence of authority (or rather want of authority, because the Admiralty never claimed the right to claim) might well be regarded as decisive. But there is another matter to be considered. The construction of a statute like this cannot properly be determined without ascertaining what the state of the law was at the time when the section was originally enacted in 1853. This, I think, makes it clear that s. 557 was intended to exclude all claims for salvage by the Admiralty and requires that it should be so construed.

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The world has become accustomed to heavy claims and awards for salvage being made to shipowners in respect of their vessels, which are regarded as agents or instruments of the salvage. If it were not for the powerful steam or motor vessels of modern days, with their elaborate and valuable machinery and equipment, salvage such as the towage of the *Valverda* could not be achieved. The personal courage and exertions of the salving officers and crew would be of little avail without the aid of the mechanical means and the power supplied by the salving vessel. But this is a modern idea due to modern conditions which did not exist when s. 39 of the Merchant Shipping Act, 1853, was enacted. That section was re-enacted by s. 484 of the Merchant Shipping Act, 1854, which again was re-enacted by s. 557 of the consolidating Act of 1894. As the language of the three sections is substantially the same, it is essential to observe what the law was in 1853, because it was in view of that state of law that s. 39 was passed. At that time it is, I think, clear from the cases that the original idea that salvage was personal still retained its force, but was in process of being weakened by the growing sense that private shipowners should in certain cases be given for the services of their steam vessels remuneration which went beyond the awards in respect of demurrage or repairs, actual expenses and perhaps risk, which constituted the limit of what was generally given them in those days. Even in

1831 in *The Jane* (1) the Court observed that the claim of owners was generally very slight unless their property became exposed to danger or they incurred real loss and inconvenience. The award given in that case of 700*l.* was to cover demurrage, repairs, risks and all expenses. A little earlier in *The Vine* (2) it had been laid down that the general rule was that parties not actually occupied in the salvage services were not entitled to salvage, but an exception was made in favour of owners of vessels which in rendering assistance had experienced special mischief and loss. But a special exception had already begun to be made in the case of steamships. A very early instance is *The Raikes* (3) in 1824. The reason was explained to be because of their greater power and efficiency. But this practice was not extended to claims in respect of King's ships, whether steam or sailing vessels. It was well recognized that the officers and crew were entitled to claim, but I know of no case before 1853, except H.M.S. *Thetis* (4), decided in 1833, where the Admiralty claimed or were awarded even expenses. This was an exceptional case in which naval crews with the help of naval vessels salvaged sunken dollars to the value of 157,000*l.* The Admiralty were awarded 12,000*l.* to cover the pay of the men during the eighteen months in which they were employed on the salvage, and also victualling, wear and tear of ships and all expenses during their prolonged operations. Nothing was claimed or awarded for the user of the vessels. Sir Christopher Robinson said that the case was different from the assistance afforded in ordinary cases by public vessels for which theretofore nothing had been charged. But even in that case the award was made on the basis of the owners not objecting. It is to be noted that claims made by naval officers and crews were habitually described as claims by ships of His Majesty, but the Admiralty were not claimants. In *The Lustre* (5) the Admiral at Portsmouth despatched His Majesty's steamer *Dee* to assist a vessel in distress on the terms expressly agreed that the owners and

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(1) (1831) 2 Hagg. Adm. 338.

(4) 3 Hagg. Adm. 14.

(2) (1825) 2 Hagg. Adm. 1.

(5) 3 Hagg. Adm. 154.

(3) (1824) 1 Hagg. Adm. 246.

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underwriters would be responsible for all stores expended or damaged. Sir John Nicholls awarded salvage to the officers and crew, observing that it was a mistake to suppose that the public force was to be employed gratuitously in the service of private individuals to save them from expense. That was a peculiar case, but the Admiralty did not claim in the suit. The claim was by the officers and crew. The Admiralty were paid, it seems, under the express bargain which was only for stores expended and damaged. In *The Iodine* (1) in 1844 the claim was by the officers and crew as usual and not by the Admiralty. The Court observed with regard to His Majesty's vessels that the award would be less, the vessels being at the expense of the country. That must have referred to the award to the officers and crew, as they were the claimants. These and other cases seem to me to show clearly that no one dreamt of any claim by the Admiralty for the use of public vessels in salvage, and that claims by the Admiralty for risk, loss or damage were for all practical purposes never made. H.M.S. *Thetis* (2) and *The Lustre* (3) seem to be the exceptions which prove the rule. They may have been noticed as cases tending to introduce a new and, as it seemed, objectionable practice, which called for legislative prohibition. Hence s. 39 of the Act of 1853 took the form it did. It excluded every claim that any one thought could be made for salvage by a King's ship, and I have no doubt was intended to exclude all claims for salvage by the Admiralty, and should, I think, be so construed. Meticulous draftsmanship has at times caused difficulty by making an enumeration believed to be exhaustive, where a simple universal would have better served.

That is certainly what has been understood in the reported cases and text-writers from the passing of the Act of 1853 until the question was raised in this case. In 1857 in *The Mary Pleasants* (4) Her Majesty's vessel *Leopard* had rendered salvage services. The officers and crew with the authority of the Admiralty under the Act of 1854 claimed and were

(1) 3 Notes of Cases, 140.

(2) 3 Hagg. Adm. 14.

(3) 3 Hagg. Adm. 154.

(4) (1857) Swa. 224.

awarded salvage for their personal services. Dr. Lushington added: "When I say personal services I use that expression "in order to distinguish it from other cases, inasmuch as it "has been observed by Dr. Twiss, that no claim could be "made on account of the assistance given by the vessel herself "for any risk or damage she had incurred." Dr. Lushington is plainly negating any claim whatever by the Admiralty. The Admiralty have sought since then to claim salvage on the ground, not that salvage was claimable in respect of a King's ship, but that the salving vessel was not a King's ship. Such a claim failed in *The Matti* (1), where salvage was rendered by a requisitioned ship. The Admiralty claimed a salvage award but their claim was rejected in toto because it was held the *Matti* was a King's ship, so that the Admiralty claim failed because of s. 557, though the claim of officers and crew was allowed. It was not suggested that, though the Admiralty had no general claim for salvage, at least there was a limited claim for the use of the ship. There are other cases to the same effect which I need not cite. In 1916 in *The Sarpen* (2) it was held that the salving tug was not a King's ship, but Swinfen Eady L.J. thus stated the law: "Where salvage services are rendered by a King's ship, no "claim to salvage can be made in respect of the ship, but "the commander and crew may prosecute a claim with the "consent of the Admiralty (s. 557 of the Act of 1894)." It is interesting to compare these words with the words of Dr. Lushington in 1857. Pickford L.J. states the law to the same effect, and so I think did Bankes L.J., though he uses the word "restricting." There is in fact no exception on this matter to the course of authority.

The same view of the law was, I think, taken by the Legislature when they passed the Act of 1916 set out above. That Act clearly presupposes that without it the Admiralty could have no claim at all for salvage. The Act, so far as the special classes of vessels are concerned, gives to the Admiralty (1.) a claim for salvage; (2.) a claim on the same footing as if the vessels were not vessels belonging to His Majesty. The Act

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(1) [1918] P. 314.

(2) [1916] P. 306, 312.

H. L. (E.) was no doubt passed because of the decision in *The Sarpen*. (1)
 1937 The change which it made when applied to the case of tugs
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 v. what had been held in the Court of Appeal in the same case
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The long and unbroken sequence of cases in which the statutory prohibition against the Admiralty claiming any salvage of any kind at all has been assumed, or enforced without the contrary ever being suggested by the Admiralty, and the recognition of the prohibition by the Legislature in 1916 would, in my judgment, in any event make it impossible for this House to hold now that the Admiralty have the right to claim anything for salvage for the use of the vessel.

I have given reasons for the view that the true construction of the clause is to exclude all claims whatsoever for salvage by the Admiralty, but even if I were wrong in this, it would, I think, be too late for this House to set aside the consistent and unbroken authority of the Admiralty Court and the Court of Appeal, and depart from the established rule and practice, even though the question has not been determined by this House. This House has no doubt power to overrule even a long established course of decisions of the Courts, provided it has not itself determined the question. It is impossible to lay down precise rules according to which this power will be exercised. But in general this House will adopt this course only in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law. This is not such a case. The Admiralty, on whom rested the responsibility for all these years of correcting the error, if error there was, have abstained until now from attempting to do so. When in 1916 the Government introduced legislation which was based on, but intended to vary, the prevailing view of the law, the departure from the

(1) [1916] P. 306, 312.

(2) [1921] 1 A. C. 137, 142.

(3) [1919] 1 K. B. 299.

(4) [1920] P. 442.

existing rule was of strictly limited extent and left the main bulk of the rule unaffected. If the law is now to be declared in a different sense, it must be by the Legislature.

This point does not seem to have been raised as a substantive question in these proceedings until the appeal came before this House, though it seems to have been adverted to before Branson J. Your Lordships are asked to remit the case to the arbitrator and reopen what would, in effect, be a new inquiry. No doubt your Lordships have jurisdiction to remit, but I should not think it would be a proper case in which to exercise that discretionary jurisdiction. However, I think the point is bad in law.

In my judgment the appeal fails, the order of the Court of Appeal should be affirmed, and the Admiralty should pay and bear the costs of the appeal to this House.

LORD MAUGHAM (read by LORD RUSSELL OF KILLOWEN). My Lords, the opinion of my noble and learned friend Lord Wright contains an ample statement of the facts and an elaborate examination of the authorities, both of which I am happy to be able to adopt without qualification. The importance of the case, and the able arguments of counsel, are my excuse for adding some remarks, shortly stating in my own language the reasons which have led me to the same conclusions. Three points of general interest arise on this appeal : First, are the provisions of s. 557, sub-s. 1, of the Merchant Shipping Act, 1894, excluded by a contract of the nature of a salvage agreement made between the Admiralty and the owners of the vessel saved ? Secondly, does an agreement for rendering services to a vessel in distress cease to be an agreement for salvage under the maritime law if there is found in it a provision for some recoupment or remuneration being paid to the salvor if the services turn out to be wholly unsuccessful ? Thirdly, does s. 557, sub-s. 1, upon its true construction exclude claims by the Admiralty to remuneration of any kind for salvage services successfully rendered ?

While adding a few remarks on each of the questions I desire to make it clear that I entirely agree with the views expressed by my noble and learned friend.

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My Lords, on the first point it is to be observed that s. 557, sub-s. 1, contains without ambiguity two prohibitions. The first prohibits a claim on behalf of the Crown in the enumerated losses and expenses sustained by the Crown in rendering salvage services and for the risk to which the ship and her contents have been exposed; the second prohibits claims by the commander or crew unless the consent of the Admiralty to the prosecution of the claim is proved. It seems to be evident that the second prohibition cannot be avoided by a contract between the commander and the master of the ship. No one indeed suggests that that is possible. Why is a different rule as a matter of implication to be applied to the first prohibition? This alone seems to me to be a sufficient reason for answering the first question in the negative; but there are other reasons equally decisive. Nothing in the language of the section suggests that a salvage agreement will take the case out of the statute. The section can only be explained on the hypothesis that the Legislature thought that such claims by the Admiralty were not in the public interest. Sects. 557 to 564 are prefaced by the heading "Salvage by Her Majesty's Ships." A mere perusal of them tends to show that they are general and not intended to be excluded by a salvage agreement. If such an exclusion had been intended it would have found an appropriate and a suitable place in s. 562. Finally, it is legitimate to consider the position as it was in 1853 when the relevant part of s. 557 was first enacted (s. 39 of the Merchant Shipping Act, 1853). At that date there was no such device as that of wireless communication. Is it to be supposed that the framers of the section conceived that the commander of one of Her Majesty's ships was to be at liberty, for the benefit of the Crown, to negotiate an agreement ousting the section with the master of a vessel in grievous distress on the high seas? If an answer in the affirmative were possible it would seem to follow that such a commander ought always in carrying out his duty to the Crown to do his best to secure such an agreement. In my opinion it is clear that the answer must be in the negative; and, if so, it follows that, since the prohibition is absolute in its terms, there can be no ground for implying

such a term as is suggested—namely, an exception or qualification in the case where there is an agreement. Unless such a term can be implied I think that no question of “contracting out” of the section arises at all. We have to deal with an imperative prohibition binding the Crown in its relation with subjects, and I am unable to understand how it could be right to hold that the prohibition is to cease to have effect if the Admiralty, being in control of the situation, insisted on a salvage contract. So to hold would be to make the prohibition futile.

On the second point it should be noted that the question of the effect of a stipulation that certain expenses or losses incurred by the salvor should be paid for in any event is of a general character, and not confined to the services of the King’s ships. If there had been any sound reason behind the argument that such a clause was wholly inconsistent with the nature of salvage, no doubt we should have been bound to give the contention its effect; but the examination of the matter in the speech of my noble and learned friend seems to me a sufficient answer to that contention. I can see no reason for holding that the master or owner of a ship cannot enter into a true salvage agreement, for example, in Lloyd’s well known form, and at the same time enter into another agreement with the salvor that certain definite expenses which he expects to incur in any event shall be recouped to him whether his services are fruitful or not. If this be so, such a clause as clause 5 in the Admiralty Standard Form of Salvage Agreement is clearly severable from the true salvage agreement. For myself I will add that it would be unfortunate if the contention that an agreement in the Admiralty Form (with clause 5 in it) is not a salvage agreement at all were to prevail. The master of a commercial vessel may well be willing to enter upon a salving enterprise possessing very doubtful prospects of success if he can secure an agreement that a certain expense or loss in which the job will involve his ship will in any event be repaid. It would not be in the true interests of shipping if this were held to be impossible.

The third point has occasioned your Lordships some trouble and has involved much consideration of the authorities.

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The difficulty has been caused by the defective form of the first part of s. 557, sub-s. 1. On the one hand the question leaps to the mind, Why did not the Legislature simply enact that in the case of services being rendered by any ship belonging to Her Majesty no claim for salvage services should be made? On the other, one asks oneself why should the Admiralty be deprived of precisely that recoupment which one would have thought reasonable, that is, recoupment in respect of actual expenses and loss incurred by the salving vessel, and yet be left to make some claim for remuneration? And finally, if there is to be some remuneration, how is it to be estimated or assessed if not only all expenses and loss sustained by reason of the services are to be excluded, but also any consideration based on the risk caused to the ship and her stores, tackle, and machinery? My Lords, I am not sure that wholly satisfactory answers can be given to all these questions; but on the conclusion of the arguments of counsel and after reading all the authorities they referred to, it seemed to me reasonably clear that the specific exclusions enumerated in the section were designed to leave nothing upon which a salvage award could properly be founded. The only item or element in the assessment which the words of the material part of the section do not specifically include is the "use" of the salving vessel. The arbitrator concerned would certainly have to omit from his estimate the whole of the expenses and losses incidental to such use of a ship belonging to the Crown and also the risk incurred. I do not suppose that he would be unable, on some such lines as those indicated, not without some characteristic sarcasm, by Lord Sumner in *Admiralty Commissioners v. S.S. Chekiang* (1), to name a figure for what I may call the barren use—the skin of the plum without either the fruit or the kernel—but I think we have to ask ourselves whether in 1853 the words of the section placed such a curious burden on him. When once it is established that before that date no such claim had ever been made in respect of a ship belonging to Her Majesty, and that the awards which had been made in respect of them were limited to such matters as victualling,

(1) [1926] A. C. 637.

wear and tear, and actual losses and expenses, all of which are prohibited since 1853, we are led a long way towards a negative answer. It is, I think, relevant to consider that the owners of sailing ships did not very often render such services, apart from the services of their crews, as to entitle them to salvage awards. With the coming of steamships and the increased possibilities of towage the situation gradually altered. But at first the element in the services of a ship and its owners, which was mainly, if not solely, regarded, was the element of special loss and expense incurred: see *The Vine* (1) and the very remarkable case of H.M.S. *Thetis*. (2)

It should be observed that in 1853 steam navigation was still in its infancy. The majority of Her Majesty's ships and the overwhelming majority of commercial ships were still sailing vessels. The early paddle-steamers were of small size. In 1853 only three or four line-of-battle ships were propelled by a screw, and they were converted sailing-ships: see Clowes, *History of the Royal Navy*, vol. vi., pp. 196 et seq. In view of these facts it would seem unlikely that the wording of the section, which makes no distinction between steamships and sailing ships, was designed to permit a special allowance for the use of steamships belonging to the Crown, while precluding any claim for (among other things) the prodigal expenditure of coal which the engines of that day required. This consideration may perhaps serve as an addition to the reasons given by my noble and learned friend derived from his careful examination of the authorities. Having regard to those reasons, including the amending Act of 1916 and the unbroken chain of authority in which the statutory prohibition against claims by the Admiralty of salvage of any kind (except under the Act of 1916) has been assumed, it is in my view impossible to come to any conclusion except that the section now bars any claim by the Admiralty for salvage by ships which are neither tugs nor specially equipped with salvage plant.

My Lords, this concludes what I have to say on the three main points. I have nothing to add on the question of the true construction of the salvage agreement in the Admiralty

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(1) 2 Hagg. Adm. 1.

(2) 3 Hagg. Adm. 14.

H. L. (E.) Standard Form to what has been said by my noble and learned friend, and to the reasons given in the able and exhaustive judgment of Scott L.J. I concur in the proposed motion.

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LORD ROCHE (read by LORD RUSSELL OF KILLOWEN). My Lords, had the argument for the appellants in this House rested where it stood before the arbitrator, and before Branson J. and the Court of Appeal, I should have been content to say that I was satisfied with the reasoning of the majority judgments in the Court of Appeal and most fully developed in the lucid and learned judgment of Scott L.J. But the argument has assumed a wider range, and I think it right to state shortly my reasons for agreement with the conclusions set out in the opinion of my noble friend Lord Wright, which I have had the advantage of perusing.

The last point taken in your Lordships' House, and not taken at any earlier stage in the proceedings, is perhaps logically the first point in the case. It is that the statutes relevant to be considered do not forbid claims for salvage by the Admiralty for the services of a ship but only forbid the consideration of certain elements which would otherwise fall for consideration in the making of a salvage award. It would, I think, be a sufficient answer to say that the point was taken altogether too late and that the award ought not now to be remitted for consideration. But the point has been fully argued, and it is more satisfactory that it should be dealt with on its merits. It was urged that the statutes did not forbid a claim or an award which, neglecting the specifically forbidden elements, took into account the time and the use of a salving vessel and the benefit conferred on a salvaged vessel. This contention is in my judgment unsound and is only plausible if the history of the matter is ignored. The law of salvage as administered by the Court of Admiralty is a maritime law derived from ancient and various sources and developed and built up by decisions of the Court. Various kinds of salvage services and various classes of salvors have been recognized by the Court as entitled to salvage remuneration. Before the year 1853 those responsible for the Navy of this country and

therefore to be regarded as interested in the vessels under their charge were not so recognized, save that in isolated cases, of which H.M.S. *Thetis* (1) is certainly one, remuneration was claimed and awarded in consideration of or based upon what I may call out-of-pocket expenses. Then in 1853 Parliament stepped in and forbade such claims. The prohibition was repeated in the Act of 1854 and in the consolidation Act of 1894, and was recognized by the Act of 1916 as a general prohibition of claims for salvage services. The language of the Acts may not be very apt to prohibit claims which had never been thought of or made when the statutes were passed. But it is in my opinion quite sufficient to prevent any Court or arbitrator exercising Admiralty jurisdiction from doing what might have been done before 1853, that is to say, making an award in respect of salvage claims of the Crown and probably also in proper circumstances extending the grounds and basis of such an award by the inclusion of elements not previously taken into consideration. But there is a long and unbroken stream of decisions and dicta treating the statutes of 1853, 1854, 1894 and 1916 as precluding all claims for salvage on behalf of the Crown, save of course in so far as certain claims are now authorized by the Act of 1916. I am satisfied that this view of the effect of the statutes is correct. My noble friend Lord Maugham has assigned forcible reasons for holding that the express words of the statute cover the case; but I hold the view that the same result follows by necessary implication. If I may use a familiar illustration I would say that if a man when he received services from the servant of another were told that he was not even to pay such servant his out-of-pocket expenses incurred in connection with such services he would know quite well that still less must he remunerate the servant for those services. So here where a claim for salvage remuneration in respect of out-of-pocket expenses is forbidden it would in my judgment be quite improper for any tribunal to entertain a claim for salvage remuneration in another form.

My Lords, holding this view on a point which goes to the

(1) 3 Hagg. Adm. 14.

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root of the controversy in the present case, I am in no doubt as to the proper answer to the other contentions of the appellants. As to the construction of the agreement, I think it is an agreement that the Admiralty should receive and the shipowners pay an amount of salvage to be assessed in accordance with the law as administered by the Court of Admiralty and as regulated by statute. If it stipulated for an assessment on some other basis ignoring the statutes, as I think it does not, then I think it cannot be given effect to. The statutes are statutes regulating the public service, and with all respect to those who have thought otherwise their provisions seem to me quite inescapable by any process of contracting out or of waiver at the will of either a public officer or a private person.

There remain two other contentions. The first was one which found favour with Greer L.J. and was much pressed in this House—namely, that the agreement was not an agreement for salvage, and that inasmuch as there was an agreement for payment, the payment stipulated for was not salvage remuneration. It is true enough that the right to salvage arises independently of and is not based upon contract; but it is untrue to say that where there is a contract as to salvage it ceases to be salvage. Counsel for the respondents was probably not far from the mark in saying that in these days of Lloyd's salvage agreements the larger number of salvages are regulated by agreement. Nevertheless they do not cease to be salvages, and they are dealt with and paid for in accordance with the maritime law of salvage. The task would be endless to cite the cases in which the Court of Admiralty has administered the law upon this basis and by so doing has negatived the contention now put forward.

There remains the contention that this particular agreement by reason of its nature, and in particular by reason of the presence of clause 5, is an agreement which was not a salvage agreement and therefore is free of the rules of salvage law. It is true enough that "no cure, no pay" is of the essence of salvage. Unless the res is saved and a claimant to salvage brings about or contributes to its safety he is not ordinarily

entitled to salvage remuneration in the proper sense ; but there is no reason in principle or upon any authority why a person should not alternatively be a salvor entitled to salvage remuneration or a labourer worthy of some hire. That alternative position may arise by reason of an agreement antecedent to any salvage services, as in the familiar case of a towage agreement : see *Five Steel Barges*. (1) In such a case salvage remuneration may be earned if the circumstances warrant it, but if it is not the towage money will be payable. Similarly with an agreement made contemporaneously with or subsequent to the rendering of services I see no obstacle in the way of alternative and truly severable stipulations for remuneration on different bases according as the facts turn out. That is the situation I find here upon the plain terms of the agreement. One basis stipulated for is a salvage basis, and it does not change its character because of the presence of a stipulation for some remuneration on another basis if there is no salvage. The true effect of such stipulations in a case of salvage has been dealt with by a judge of the highest authority in these matters, Gorell Barnes J., in the two cases discussed by my noble friend Lord Wright (*The Kate B. Jones* (2) and *The Edenmore* (3)). In the former case the argument now presented to your Lordships appears to have been taken, though slightly, but was rejected by the learned judge, in whose view the only materiality of the alternative stipulations was that the stipulation for some remuneration in case there was no salvage was a factor tending to diminish the award proper to be made in case salvage was earned. The ground for this view was that the salvor in such circumstances never ran the risk of losing all his pains.

My Lords, I prefer this reasoning to the argument for the appellants and think this point also fails them. For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Solicitor for appellants : *Treasury Solicitor*.

Solicitors for respondents : *William A. Crump & Son*.

(1) (1890) 15 P. D. 142.

(2) [1892] P. 366.

(3) [1893] P. 79.

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ADMIRALTY
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v.
VALVERDA
(OWNERS).

Lord Roche.

[HOUSE OF LORDS.]

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 Nov. 8, 9, AND
 11, 12, 15 ; WENLOCK CORPORATION RESPONDENTS.
 Dec. 22.

Local Government—Stream—Sewer—Change of status of stream—Statute—Violation of statutory prohibition—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 15, 17—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), ss. 3, 20.

It is not in law possible for the status of a natural stream to be changed to that of a sewer by the discharge of sewage into it after the coming into operation of the Rivers Pollution Prevention Act, 1876.

Airdrie Magistrates v. Lanark County Council [1910] A. C. 286 applied.

Falconar v. South Shields Corporation (1895) 11 Times L. R. 223 ; *Newcastle-upon-Tyne Corporation v. Houseman* (1898) 63 J. P. 85 ; *Yorkshire (West Riding) Rivers Board v. Gaunt & Sons* (1902) 67 J. P. 183 ; and *Bethnal Green Vestry v. London School Board* [1898] A. C. 190 distinguished.

Per Lord Maugham: While there are statutes imposing duties or prohibitions which can be waived, there is no case in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrongdoer.

Decision of Court of Appeal [1936] W. N. 326 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Crossman J. (2)

The plaintiffs, who carried on brick and tile works at Blest Hill, Madeley, which is in the defendants' borough of Wenlock, claimed that a certain watercourse running through their property was a sewer vested in the defendants, and was a nuisance to the plaintiffs.

The watercourse in question began as a natural stream and flowed through Madeley, passing by a culvert through part of the plaintiffs' property, upon which culvert the

(1) [1936] W. N. 326.

(2) [1936] W. N. 274.

* *Present* : LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD MAUGHAM, and LORD ROCHE.

plaintiffs had erected spoil banks, the culvert having been made by the plaintiffs' predecessors in title. For upwards of twenty-five years past about twenty houses in the township of Madeley had discharged sewage into the watercourse, and between 1925 and 1929 forty-four more houses had been erected in the township which discharged their sewage into water surface drains and eventually into the said watercourse at a point about 300 yards above the mouth of the culvert. The defendants were the sanitary authority for the borough of Wenlock and as such liable to repair all sewers vested in them and were, as the plaintiffs alleged, bound to prevent those sewers becoming a nuisance.

In June, 1930, the contents of the culvert overflowed and caused considerable damage. The plaintiffs were then sued for causing damage and nuisance to certain property below the culvert and had to pay damages and costs.

The plaintiffs now claimed that the watercourse had become a sewer for which the defendants were responsible. The defendants denied this, and alleged that the watercourse normally carried clean rain-water, and ran into the Severn. They further denied that they were responsible for the condition of the culvert, and they counterclaimed the expense of repairing it.

At the trial it was agreed that the following point of law should be formulated under Order xxxiv., r. 2 :—" Whether "the change of status from a natural stream to a sewer "within the Public Health Act, 1875, as claimed in para. 5 "(c) of the plaintiffs' reply to have taken place, was in "law possible."

Crossman J. held that a change of status from a natural stream to a sewer within the meaning of the Public Health Act, 1875, as claimed, was in law possible ; and accordingly he answered the question formulated in the affirmative.

On appeal by the defendants, the Court of Appeal (Slesser, Romer and Greene L.JJ.) allowed the appeal, holding that the authorities established that it was not in law now possible to say that a flowing watercourse could become a sewer by the discharge into it of sewage matter, the point being, in

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H. L. (E.) their opinion, concluded by the decision of the House of Lords in *Airdrie Magistrates v. Lanark County Council*. (1)

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The plaintiffs appealed to this House, where the question was reformulated in these terms: "Whether it is in law possible for the status of a natural stream to be changed to that of a sewer by the discharge of sewage into it after the coming into operation of the Rivers Pollution Act, 1876." (2)

Alexander Grant K.C., Trustring Eve K.C., and G. D. Squibb for the appellants. We submit that the watercourse or stream in question is a sewer within the meaning of that term in the Public Health Act, 1875 (3), which is therefore as such vested in the respondent local authority. The fact that sewage matter was discharged into the stream had the effect of changing its status and converting it into a sewer. The word "sewer" is a term of the widest signification: *Acton Local*

(1) [1910] A. C. 286.

(2) Rivers Pollution Prevention Act, 1876, s. 3: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. . . ."

Sect. 20: "In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

""

" 'Stream' includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the London Gazette. Save as aforesaid, it includes rivers streams canals lakes and watercourses, other than watercourses at the passing of this

"Act mainly used as sewers, and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid. . . ."

(3) Public Health Act, 1875, s. 4: ". . . . 'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed:"

" 'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

Board v. Batten. (1) In *Travis v. Uttley* (2) it was decided that a drain passing through private ground, but which received the drainage of more than one building, was a "sewer" within the meaning of the Act of 1875. In *Falconar v. South Shields Corporation* (3), in the Court of Appeal, Lord Halsbury said that whether the burn there being considered was a sewer or not was a question of fact, but upon the whole of the facts before the Court it was not open to doubt that it had been used as a sewer for many years, as it had received the surface-water of the neighbouring land and also refuse matter of every description, and that being so it was vested in and repairable by the local authority. Lindley L.J. took the same view, pointing out that in days gone by the stream was a purely agricultural stream, but by degrees its character had completely changed, and it had become a sewer in the ordinary sense of the word. That case strongly supports our contention. The decision of Byrne J. in *Newcastle-upon-Tyne Corporation v. Houseman* (4) was to the same effect—namely, that a tidal stream had become a sewer. It is said, however, that this case is concluded against the appellants by the decision of this House in *Airdrie Magistrates v. Lanark County Council.* (5) We submit, however, that that case has no bearing on the point under discussion, for here the stream had in fact become a "sewer." *Attorney-General v. Lewes Corporation* (6) directly supports our contention, it being there laid down in terms that the discharge of sewage into the channel of an intermittent stream may have the effect of converting it into a sewer even although the natural flow of the pure water is not cut off. Once a sewer always a sewer unless it ceases to be used for sewage purposes.

[LORD MAUGHAM. That which is a "stream" within the meaning of the Rivers Pollution Prevention Act, 1876, cannot be a "sewer."]

In *Airdrie Magistrates v. Lanark County Council* (5) the burns had not lost their character as "streams" within

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(1) (1884) 28 Ch. D. 283.

(2) [1894] 1 Q. B. 233.

(3) 11 Times L. R. 223.

(4) 63 J. P. 85.

(5) [1910] A. C. 286.

(6) [1911] 2 Ch. 495.

H. L. (E.) the technical meaning of that word in the Act of 1876.
 1937 That is not the case here ; this which was originally a stream
 GEORGE has become a sewer. To pour sewage into a river which
 LEGGE is already polluted is not an infringement of s. 17 of the
 & SON, LD. Public Health Act, 1875 ; and in a number of cases it
 v. has been decided that a pipe may none the less be a sewer
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 CORPOR- *Kershaw v. Taylor* (1) ; *Reg. v. St. Matthew, Bethnal Green,*
 TION. *Vestry* (2), affirmed sub nom. *St. Matthew, Bethnal Green, Vestry*
v. London School Board (3) ; *Clark v. Epsom Rural District*
Council. (4)

Tyldesley Jones K.C., Charles Harman K.C., and Wilfrid M. Hunt for the respondents. That which is a " stream " under the Rivers Pollution Prevention Act, 1876, cannot at the same time be a " sewer " under the Public Health Act, 1875. " Sewer " is a well known English word denoting an artificial water-way of a particular character ; it is defined thus in the Oxford English Dictionary : " An artificial watercourse for "draining marshy land and carrying off surface-water into "a river or the sea," and secondly as "an artificial channel "or conduit, now usually covered and underground, for "carrying off and discharging waste-water and the refuse "from houses and towns. *Common sewer* : a drain through "which all or a large part of the sewage of a town passes, a "main drain collecting and discharging the contents of "auxiliary drains." A " sewer " conveys foul sewage ; and a natural stream cannot be converted into a sewer by the illegal discharge into it of sewage. *Falconar's* case (5) rightly understood is a distinct authority in the respondents' favour. There was nothing there other than water which came from surface drainage. That case was cited in the later case of *Yorkshire (West Riding) Rivers Board v. Gaunt & Sons* (6), and there Lord Alverstone, who was one of the counsel who argued *Falconar's* case (5), said in the course of his judgment (7) : " Further, we think that after the passing of the

(1) [1895] 2 Q. B. 471.

(5) 11 Times L. R. 223.

(2) [1896] 2 Q. B. 319.

(6) 67 J. P. 183.

(3) [1898] A. C. 190.

(7) Ibid. 185.

(4) [1929] 1 Ch. 287.

"Acts of 1861, 1875 and 1876, the local authority could "not merely by the illegal act of discharging sewage into a "watercourse make that watercourse a sewer": see also Lord Alverstone's observations in the later case of *Yorkshire (West Riding) Rivers Board v. Preston & Sons.* (1) Further, in *Falconar's* case (2), the Rivers Pollution Prevention Act, 1876, was not referred to. The decision of the House in *Airdrie Magistrates v. Lanark County Council* (3) that the streams there in question remained "streams" within the Act of 1876 notwithstanding that sewage had been discharged into them is directly in point. In the course of his opinion Lord Loreburn L.C. said (4): "But what the appellants "say is this: Permit us to prove that these burns are sewers, "and if we can prove that they are sewers, surely it cannot "be an offence to pour sewage matter into the sewers. My "Lords, that is merely asking leave to prove that they have "with or without the contribution of others committed in an "aggravated degree the very offence with which they are "charged. The object of the Act [of 1876] is to prevent "streams being turned into sewers, and this is what they "propose to do and have done." This language is exactly applicable in the present case and is conclusive against the appellants' contention.

Grant K.C. in reply. Applying the test in *Falconar's* case (2), the question of the conversion of a watercourse from a "stream" into a "sewer" is one of fact. If it has become substantially a sewer, the conversion is proved; and it is from the de facto condition of the channel that the question is to be determined whether the act complained of is legal or illegal. In *Airdrie Magistrates v. Lanark County Council* (3) there was no proof that the burns had become sewers; that distinguishes it from the present case.

The House took time for consideration.

1937. Dec. 22. LORD ATKIN. My Lords, the opinion

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(1) (1904) 69 J. P. 1.

(2) 11 Times L. R. 223.

(3) [1910] A. C. 286.

(4) Ibid. 291.

H. L. (E.) which I am about to read is that of my noble and learned friend, Lord Macmillan, in which I concur.

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LORD MACMILLAN (read by LORD ATKIN). My Lords, the problem for solution in this appeal is presented to your Lordships in the unusual shape of a general question of law which emerged and was formulated for separate decision in the course of the proceedings between the parties. There may have been some justification for the adoption of this exceptional course in the special circumstances about to be narrated, but it is to be hoped that it will not become a frequent practice, for it may readily lead to embarrassment, as indeed your Lordships have experienced during the discussion of the case. The question arose in this way. The plaintiffs (now the appellants), who are the owners of certain lands situated in the borough of Wenlock in Shropshire, by writ dated February 26, 1932, instituted proceedings against the defendants, the Corporation of Wenlock, as the sanitary authority of the borough. In their claim the plaintiffs (*inter alia*) seek a declaration that a culvert running through their lands and constructed by one of their predecessors in title "is a sewer "vested in and repairable by the defendants." They also claim repayment of a considerable sum of money expended by them in repairing the culvert, which had broken down and caused serious flooding in June, 1930.

The action came on for trial before Crossman J. in July, 1936, and after the plaintiffs had called part of their evidence the learned judge ordered the following question of law to be set down for argument before him: "Whether the change "of status from a natural stream to a sewer within the "meaning of the Public Health Act, 1875, claimed in "para. 5 (c) of the reply and defence to counterclaim to "have taken place is in law possible." In para. 5 (c), referred to in the question, the plaintiffs alleged that at the time when the culvert was constructed by their predecessor, which was before 1882, the channel "was a natural stream or "watercourse not vested in or repairable by the then local "authority, the Madeley Local Board. The amount of

"sewage discharged into it at that time was not sufficient to
 "change its status to that of a sewer. That change of status
 "by discharge of sewage took place subsequently, at a time
 "difficult to estimate with exactness but during the twenty-
 "three years referred to in para. 7 of the defence. Upon
 "that change taking place, the liability to repair the culvert
 "and inspection shafts, the latter being 'buildings works
 "'materials and things belonging' to the culvert within s. 13
 "of the Public Health Act, 1875, fell upon the corporation,
 "and has at all material times been and is upon the corporation,
 "and the nuisance annoyance inconvenience loss and damage
 "referred to in the statement of claim all arose from the
 "failure of the corporation to discharge the statutory duty
 "referred to in para. 2 of the statement of claim," i.e.,
 the duty "to repair all sewers vested in them and to prevent
 "such sewers from becoming in such a state as to be a nuisance
 "and to manage such sewers with proper diligence." The
 reference to a period of twenty-three years is explained in
 the following quotation from para. 7 of the defence:
 "Certain storm water or surface-water drains within the
 "township of Madeley which is situated in the said borough
 "discharge and have at all material dates discharged into the
 "watercourse but the nearest of such drains to the entrance
 "of the said culvert is about 315 yards above the same. Such
 "drains have existed for at least twenty-three years and all or
 "some of these were made by the local authority of which the
 "corporation are the successors. The corporation admit that
 "in the case of about twenty houses sewage therefrom has
 "been and is discharged into such surface-water drains but
 "this has been done for upwards of twenty-three years and
 "the corporation say that there were and are prescriptive
 "rights vested in the owners of the said houses so discharging
 "sewage to continue so to do and the corporation could not
 "and cannot prevent such discharge. The corporation also
 "admit that forty-four further houses were erected in the said
 "township between the years 1925 and 1929 pursuant to the
 "Housing Acts and that the sewage from these houses has
 "since then been and is discharged into pre-existing main

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H. L. (E.) "water surface drains and through such drains or ditches in
 1937 "conjunction with surface-water into the watercourse at a
 GEORGE LEGGE "point about 315 yards above the mouth of the said culvert."

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The foregoing quotations sufficiently indicate the nature of the questions of fact to which the plaintiffs were addressing their evidence when the investigation was arrested to await the decision of the point of law which had emerged. The learned judge was no doubt influenced in isolating this point of law by mercy for the parties, as it was obvious that if the correct answer to the question were in the negative it would be idle for the parties to spend time and money in investigating the extent to which the culvert had been used for conveying sewage.

Crossman J., holding that the point was not covered by any of the numerous authorities cited to him, decided it in favour of the plaintiffs, and granted a declaration that the change of status claimed to have taken place from a natural stream to a sewer within the meaning of the Public Health Act, 1875, was possible in law. This judgment was reversed by the Court of Appeal, where the view was expressed that the matter was concluded in favour of the defendants by the authority of the case of *Airdrie Magistrates v. Lanark County Council* in this House. (1)

My Lords, the channel in question when the Public Health Act of 1875 was passed was admittedly not a sewer within the meaning of that Act and therefore did not then vest in the local authority under s. 13. It was then a natural stream or watercourse within the meaning of s. 17, which provided that nothing in the Act should authorize a local authority to make or use any sewer for conveying sewage into any natural stream or watercourse until such sewage had been rendered innocuous to the purity or quality of the water in such stream or watercourse. Equally, when the Rivers Pollution Prevention Act, 1876, was passed, the channel was the channel of a "stream" within the meaning of s. 20 of that Act and the stream then became entitled to the protection of s. 3, which constitutes it a statutory offence for

any person to cause to fall or flow into any stream any solid or liquid sewage matter. The change of legal status (if such there could be) from natural stream to sewer is alleged to have been the result of the discharge of sewage into the stream since 1876. Such discharge of sewage into the stream cannot have been otherwise than in contravention of the Act of 1876 and therefore illegal. Hence arises the question of law as it was more explicitly and precisely reformulated by the parties in the joint case which they presented to this House: "Whether "it is in law possible for the status of a natural stream to be "changed to that of a sewer by the discharge of sewage into "it after the coming into operation of the Rivers Pollution "Prevention Act, 1876."

The question whether a natural stream can ever in law become a sewer by reason of an artificial change in the character of its flow, apart from any question of illegality, was very fully explored by counsel for the appellants, and in this connection it has to be remembered that a channel may be a sewer though it may carry no sewage and its contents consist solely of innocuous surface drainage. Sect. 13 of the Public Health Act, 1875, vests not only then existing but future sewers in the local authority, and there are several cases where it has been stated to be a question of degree whether a natural stream has become in law a sewer, notably *Falconar v. South Shields Corporation* (1) and *Newcastle-upon-Tyne Corporation v. Houseman*. (2) But in these cases the legality of the discharge of sewage into the stream, which it was contended had brought about the change in its legal status, was not in question. They are therefore not in point and it is not necessary for your Lordships to express any opinion as to their soundness. In *Yorkshire (West Riding) Rivers Board v. Gaunt* (3), on the other hand, Lord Alverstone L.C.J. expressly said (4): "Further, "we think that after the passing of the Acts of 1861, 1875 and "1876 the local authority could not merely by the illegal act "of discharging sewage into a watercourse make that water- "course a sewer." It should be explained that the Act of

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(1) 11 Times L. R. 223.

(2) 63 J. P. 85.

(3) 67 J. P. 183.

(4) Ibid. 185.

H. L. (E.) 1861 mentioned by the Lord Chief Justice was the Local Government Act (1858) Amendment Act, 1861, s. 4 of which was the precursor of s. 17 of the Public Health Act, 1875.

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Prima facie it would seem remarkable if it were possible to legalize the pollution of streams by contravening an Act designed to prevent their pollution. In the case of a sewer vested in the local authority adjoining property-owners are entitled to discharge their sewage into it, so that, on this argument, if a natural stream in consequence of illegal pollution becomes in fact sufficiently foul to merit the legal appellation of a sewer and so to vest in the local authority, the further pollution of it ceases to be an offence and becomes a right. When the magistrates of Airdrie and of Coatbridge had the temerity to advance in this House the contention that they were entitled to continue to pollute with sewage certain streams within their boundaries because they had for a long time been polluting them, in despite of the Act of 1876, to such an extent that the streams had to all practical intents and purposes become sewers, it is not surprising that the contention received short shrift: *Airdrie Magistrates v. Lanark County Council*. (1) I propose to examine this case in some detail.

The proceedings began with the presentation in the Sheriff Court of Lanarkshire of two petitions by the Lanarkshire County Council, one against the local authority of the burgh of Airdrie and the other against the local authority of the burgh of Coatbridge, complaining that they had committed offences against the Rivers Pollution Prevention Act, 1876, by discharging sewage into certain burns within the burghs, and craving an order on the defenders to abstain from doing so. The county authority was concerned in the matter because after leaving the boundaries of the burghs the polluted burns passed through various parishes within one of the districts of the county on their way to the Clyde. Each of the defenders lodged along with their defences an elaborate statement of facts in justification or excuse of their actings. These statements were on very similar lines and I shall quote from the *Airdrie* case (1), which was treated as the leading case. The

(1) [1910] A. C. 286.

allegation of the Airdrie local authority was that the streams in question "had for many years before the passing of the "Rivers Pollution Prevention Act, 1876, ceased to have any "existence as streams carrying off mere surface-water and had "become channels for conveying sewage," and they pleaded (inter alia) that the burns having for more than the prescriptive period before the passing of the Act of 1876 "been used as "channels for the conveying and purification of sewage must "be held to be outwith the definition of a stream in the said "Act." It is unnecessary to detail all the procedure which took place. For the present purpose it is enough to say that by interlocutor of June 4, 1909, on a special case stated in the course of the proceedings, the First Division of the Court of Session found (1.) that the Sheriff-Substitute and the Sheriff had rightly held that the burns were polluted with sewage within the burgh boundaries; (2.) that the defenders were guilty of an offence against s. 3 of the Act of 1876; and (3.) that the Sheriff-Substitute and the Sheriff had rightly repelled all but one of the pleas of the defenders, the exception being a plea to the effect that there were no means practicable and available by which the defenders could render the sewage less harmful, this plea being reserved for further consideration.

It is to be observed that the defenders carefully refrained from alleging or pleading that the burns in question had become sewers in law; they did not contend that as sewers the burns had vested in them under s. 215 of the Burgh Police (Scotland) Act, 1892, and that they were accordingly entitled in virtue of that Act to use them as sewers. In the supplementary statement annexed to their printed case in this House the defenders expressly disclaimed that the streams had vested in them. "What is vested in the sanitary authority," they say, "is not in any true sense the burn or channel of the burn "but only a limited right in it." It was thus not claimed that the burns were sewers within the meaning of the Burgh Police Act; it was plain (and had been held) that they did not fall within the exception in the definition of "stream" in s. 20 of the Rivers Pollution Prevention Act which excepts "water-courses at the passing of this Act mainly used as sewers and

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they had been mainly used as sewers they did not empty directly into the sea or tidal waters; it therefore followed that they were streams entitled to the protection of s. 3 of the Act of 1876. There is no such hybrid known to the law as a watercourse into which as a sewer sewage may legitimately be discharged and into which as a stream sewage may not be discharged. Nevertheless in this House the Airdrie local authority argued that the burns in question were not streams but sewers and asked to be allowed to prove their allegations as to the use to which the burns had been put. The position was an impossible one, for while they sought to be allowed to prove that the burns had in fact become sewers, they disclaimed that the burns had in law vested in them as sewers. Having pointed out that the burns were clearly within the definition of streams in the Act of 1876, the Lord Chancellor (Lord Loreburn) proceeded as follows (1): “But what the “appellants say is this: Permit us to prove that these burns “are sewers, and if we can prove that they are sewers, surely “it cannot be an offence to pour sewage matter into the “sewers. My Lords, that is merely asking leave to prove “that they have with or without the contribution of others “committed in an aggravated degree the very offence with “which they are charged.”

My Lords, the application of the *Airdrie* case (1) to the present case is obvious. Here your Lordships have to deal with the case of a watercourse which was admittedly a “stream” at the time of the passing of the Rivers Pollution Prevention Act, 1876, and entitled to be protected against the discharge of sewage into it. Nevertheless it is sought to prove that what was in law a protected stream has become in law an unprotected sewer simply by reason of infringements of the law designed for its protection. Now that is what your Lordships’ House in effect held in the *Airdrie* case (1) to be a legal impossibility. The answer to the question posed ought therefore in my opinion to be in the negative.

I should add that the attention of your Lordships was

drawn to some cases in which it was held that the failure to observe certain statutory requirements in the construction of a sewer or in effecting connections with it did not prevent a drain from becoming in law a sewer: see, e.g., *St. Matthew, Bethnal Green, Vestry v. London School Board*. (1) But these cases are in an entirely different region of the law. There was no question in these cases of the conversion of a natural stream into a sewer but only a question whether what would otherwise answer the legal definition of a sewer was not in law a sewer because of the disregard of certain statutory formalities in procedure.

I am accordingly of opinion that the answer of the Court of Appeal to the question was right and I move your Lordships to affirm their judgment and dismiss the appeal with costs.

LORD RUSSELL OF KILLOWEN. My Lords, I am in agreement with the opinion of my noble and learned friend, Lord Macmillan, and also with the opinion of my noble and learned friend, Lord Maugham, which I am about to read.

LORD MAUGHAM (read by LORD RUSSELL OF KILLOWEN). My Lords, this appeal has raised questions of considerable public importance, and the arguments which have been presented to us have ranged over several topics, each of which has called for the citation of a number of authorities by no means easy in all cases to reconcile and in some cases to understand. It is, however, agreed that the actual point which falls for decision lies within a very narrow compass, and I think all your Lordships concur in thinking that that point can properly be decided without travelling into legal regions beset with dangers and not yet fully explored.

The question of law submitted to the Court requires us to assume that a certain watercourse (using the term for the present in a neutral sense) running through land of the appellants known as Blest Hill, Madeley, in the borough of Wenlock, at the date when the Rivers Pollution Prevention Act, 1876, came into force and for some years thereafter was a natural stream; and in effect we are asked to determine

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H. L. (E.) whether the discharge of house sewage since that date from a large number of houses within the township of Madeley has had the result of changing the status of the watercourse from a natural stream to a sewer within the meaning of the Public Health Act, 1875. It should be added that the watercourse has for some time run in a culvert and that some, if not all, of the connections of the drains into the watercourse have been made by the respondents; but these additional circumstances will not be material unless the appellants can succeed on their main contention that, whatever the past history of the watercourse may be, and however pure its origin, the only matter to be considered is one of present fact, and if it is in substance now being used as a sewer, it must in law be a sewer within the meaning of the Public Health Act, 1875.

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My Lords, as was pointed out by counsel for the respondents, the Public Health Act, 1875, contains no definition of the word "sewer." All we are told is that the word does not include "drains" as defined, nor drains vested in or under the control of any highway authority not being a local authority under the Act. It is to be noted that s. 17, stating its effect very shortly, precludes the local authority from conveying unpurified sewage or any filthy water into any natural stream or watercourse; but apart from this it is manifest that a natural stream or its bed is not, generally speaking, a sewer. It is important at the outset to bear in mind—as was pointed out in the course of the argument by the noble Lord on the Woolsack—that "sewer" is the name given to a channel of some kind for sewage and certain liquids, and the proposition that a natural stream has become a sewer can only mean that the bed and banks of what was once a natural stream have become a legal channel for sewage. Now, under the Public Health Act, 1875, sewers, with certain exceptions, which need not be stated for the present purposes, are vested in and are under the control of the local authority (s. 13); that body must keep them in repair (s. 15); it is given wide powers of enlarging them, of covering them up, of altering their course and even of closing them up (s. 18).

Moreover, owners and occupiers within the district are entitled to drain into these sewers (s. 21). It would be more than ridiculous to suppose that the Act had given to the local authorities these extensive powers over the banks and beds of all the rivers and streams within their areas, from the Thames and the Clyde downwards, subject only to proof that such rivers and streams had been and were being used to carry away rainwater or sewage or other clean or foul liquids from a number of premises. That would have been true in 1875 of nearly every river or stream running through every town in Great Britain. It is clear, I think, that generally speaking the beds and banks of natural rivers and streams are not sewers within the term as used in the Act. Apart from s. 17 it should be observed that the Act does not contemplate that the local authorities will have an unrestricted right of pouring even a pure effluent or clean rainwater into a natural stream since there is a general saving clause for water rights, s. 332, which provides that nothing in the Act is (inter alia) to authorize a local authority injuriously to affect any river or stream or their feeders in cases where there would be, if the Act had not been passed, a right in any person to prevent it, unless with his consent in writing.

My Lords, to prevent misconception I will add that no doubt there are circumstances in which the bed and banks of what was once a natural stream might prior to the Act of 1875 have become substantially nothing but a channel for sewage. There are cases in which it has been held that such a channel has become a sewer within the meaning of the Act vesting in the local authority. The case of *Falconar v. South Shields Corporation* (1) can only be explained as a decision of the Court of Appeal in that sense and there are other authorities supporting the same proposition. I do not wish to express any doubt in reference to these cases ; the problem with which we are dealing is not concerned with them.

The Public Health Act, 1875, received the Royal Assent on August 11, 1875 ; and it was quickly followed by the Rivers Pollution Prevention Act, 1876. By s. 3 of this Act it was

(1) 11 Times L. R. 223.

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H. L. (E.) made an offence to cause to fall or flow or to be carried into any "stream" any solid or liquid sewage. There is an exception when this is done by means of a channel used, constructed or in course of construction, on August 15, 1876, for the purpose of conveying sewage matter, and the local authority carrying and knowingly permitting the sewage so to fall or flow proves that it is using the best practicable and available means of rendering the sewage harmless. The exception has little to do with the present case, except that it indicates that it is an offence to make a channel or to use a new channel after August 15, 1876, for the purpose of conveying sewage matter into a stream even if the authority is using the best practicable and available means of rendering the sewage harmless. It should here be observed that s. 17 of the Public Health Act, 1875 (above referred to) appears by inference to permit the local authority to convey sewage or filthy matter into (inter alia) a natural stream if it has been so treated that the purity and quality of the water in the stream will not be affected or deteriorated: *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*. (1) Sect. 3 of the Rivers Pollution Prevention Act, however, allows of no similar implication, except as regards channels used, constructed or in course of construction in 1876. The word "stream" is defined, not I think very happily, in s. 20 of the Act. It includes the sea to such extent and tidal waters to such point as may be determined by the Local Government Board. Subject to that saving it includes "rivers streams canals lakes and water-courses, other than watercourses at the passing of this Act "mainly used as sewers, and emptying directly into the sea, "or tidal waters which have not been determined to be "streams within the meaning of this Act by such order as "aforesaid."

Two things seem to me to be indisputable. First, s. 3 makes it an offence for any local authority to pour solid or liquid sewage into any natural stream; and the use of the best practicable means of rendering the sewage matter harmless will not avail unless the channel conveying the sewage to the

(1) [1910] 1 Ch. 48; [1912] A. C. 788.

stream was used, constructed, or in process of construction on August 15, 1876. Secondly, the definition excepts "water-courses" at the date of the Act "mainly used as sewers and emptying directly into the sea or tidal waters which have not been determined to be streams. . . ." I emphasize the word "mainly," because it is evident from it that water-courses in 1876 used to a considerable extent as sewers are yet to be deemed streams even if they emptied directly into the sea or the tidal waters mentioned; and further, watercourses which did not directly empty into the sea or the tidal waters are still "streams" within the Act, even if they were mainly used as sewers. The implied prohibition in s. 3 (as in ss. 2 and 4) is obviously not limited to pure or even substantially pure "streams." It extends to streams which at the date of the Act were being polluted to a serious extent.

There remains then in the present case the question whether a stream at the date of the Act of 1876 within the meaning of that Act can be so altered by repeated offences against that Act, and in particular by the repeated pouring of crude sewage into it, that it ceases to be a stream and that as a consequence its channel becomes a "sewer" with all the necessary consequences. There must, if the question is answered in the affirmative, be a moment of time at which that which was previously unlawful becomes by one more unlawful act something not only justifiable, but which causes the property of a number of private persons to vest in the local authority. It was contended that under s. 308 of the Public Health Act, 1875, these private persons would be entitled to compensation; but there is this serious difficulty about the contention, that the section is in clear language confined to damage by reason of the exercise of any of the powers of the Act, and that would not be the case where the local authority is acting without any such power and in defiance of an Act of Parliament.

There is another observation to be made before coming to the actual question. The Rivers Pollution Prevention Act, 1876, was unquestionably passed in the public interest. Riparian owners before that Act might certainly have obtained injunctions to restrain pollution if they could establish that

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H. L. (E.) the defendant was responsible for it ; but actions of this kind are always costly and generally uncertain in their result, unless it is clear that the defendant is the only person to blame. If the pollution is dangerous to health, no doubt it amounts to an indictable nuisance, and a civil action in the name of the Attorney-General will lie. These remedies, however, had proved insufficient in many districts to prevent very serious pollution of the rivers and streams of Great Britain and Ireland. The preamble to the Act was in these terms : " Whereas it is expedient to make further provision "for the prevention of the pollution of rivers, and in particular "to prevent the establishment of new sources of pollution." There can, I think, be no doubt that the provisions of the Act were intended to stop pollutions of different kinds not in the interest of individuals or classes of persons but in the interest of the public.

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My Lords, there are certainly statutes imposing duties or prohibitions which can be waived. As Lord Selborne pointed out in *Great Eastern Ry. Co. v. Goldsmid (Spitalfields Market Case)* (1) "Unusquisque potest renunciare juri pro se introducto". There are also cases where by the doctrine of a lost grant or lost patent or by some similar presumption individuals have, notwithstanding the terms of a statute, acquired rights apparently in contradiction of it. There is, however, no case in the books in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrongdoer. Such a contention is indeed quite untenable. The present appeal, in my judgment, and, I think, in that of all your Lordships, would therefore be bound to fail quite apart from the authority of this House in the case of *Airdrie Magistrates v. Lanark County Council* (2), in reliance on which the Court of Appeal decided the case.

My Lords, the careful examination of that authority in the speech of my noble and learned friend Lord Macmillan removes all doubt as to what was actually decided by the House, and makes it unnecessary for me to add anything on that question.

(1) (1884) 9 App. Cas. 927, 936. (2) [1910] A. C. 286.

To my mind since the judgment of the House in that case it is impossible to doubt two propositions ; and for myself I do not think they were in doubt before. First, streams within the meaning of the Rivers Pollution Prevention Act and their beds and banks are not and cannot at the same time be sewers within the meaning of that term in the Public Health Act, 1875. Secondly, to commit the offence under the Act of 1876 of pouring sewage into such a stream, even in an aggravated degree, does not convert the stream into a sewer within the Act of 1875. Perhaps I may add that as long ago as the year 1902, in the case of *Yorkshire (West Riding) Rivers Board v. Yorkshire Indigo, &c., Dyers* (1), that eminent judge, Channell J., in an interlocutory remark, put the exact point in the form of a question, which was answered by the judgment in the affirmative : “ Must not you show,” he said, “ that the sewage “got into what was formerly a natural stream by some lawful “authority, or, if not, that . . . at the date of the Act of “Parliament about rivers pollution, it had already become a “recognised sewer ? ” And he added that unless one of these two things was proved, it was only a strong case of the particular evil which the Rivers Pollution Prevention Act was meant to meet. This was putting the case in a nutshell, from which it may be hoped that it has, on the present appeal, emerged for the last time.

For these reasons I think the judgment of the Court of Appeal was perfectly correct, and that the appeal must be dismissed.

LORD ATKIN. My Lords, I am requested by my noble and learned friend, Lord Roche, to say that he concurs in the opinion of Lord Macmillan which I have already read.

Appeal dismissed.

Solicitors for appellants : *Ford, Harris & Co., for Leonard Gocher, Birmingham.*

Solicitors for respondents : *Gregory, Rowcliffe & Co., for Frederick W. Derry, Ironbridge, Salop.*

(1) 67 J. P. 80, 81.

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[PRIVY COUNCIL.]

J. C.* MOUNT ALBERT BOROUGH COUNCIL . APPELLANTS ;

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AND

AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSUR- ANCE SOCIETY, LIMITED . . .	}	RESPONDENTS.
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ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

New Zealand—Conflict of laws—Debentures—Issued by local authority in New Zealand under Local Bodies' Loans Act, 1913 (now 1926), as security for loan—Interest payable in Victoria, Australia—Compulsory reduction of interest on mortgages and other securities by Victorian legislation—Not applicable to debentures and interest payments—Contract governed by law of New Zealand—Territorial limitation of legislation—Local Bodies' Loans Act, No. 30 of 1913 (N.Z.)—Local Bodies' Loans Act, No. 14 of 1926 (N.Z.)—Financial Emergency Act, 1931, No. 3961 (Victoria), s. 14, sub-s. 1 (a), (b) ; s. 19, sub-s. 1 ; s. 28, sub-s. 1 ; s. 37.

The appellants, a New Zealand borough council, pursuant to an agreement of September 4, 1926, borrowed money for public works from the respondents, a life insurance company incorporated in Victoria, and carrying on business in Australia and New Zealand, and as security therefor issued in New Zealand debentures repayable in Victoria and bearing interest payable half-yearly in that State. The debentures were issued under the Local Bodies' Loans Act, 1913 (now 1926), of New Zealand, and the loan and interest were secured on a special rate of threepence in the pound on the rateable value of all rateable property in the borough, provision being made for a sinking fund.

Held, that the obligation of the appellants to pay the interest in Victoria was not affected by the Financial Emergency Act, 1931, of Victoria, as amended, which by s. 19, sub-s. 1, provided for the compulsory reduction of interest payments on mortgages which, by s. 14, sub-s. 1, were defined as including "any debenture . . . issued by any public or local authority." The Victorian Acts did not apply to the debentures or to the interest payable under them, and did not therefore afford a defence to a claim for the payment of interest at the full agreed rate. To hold that the Acts did apply would be to attribute to the Victorian Legislature an intention to legislate in regard to matters lying outside

* *Present* : LORD ATKIN, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

its territorial jurisdiction, because the land charged under the debenture—a charge on the rates being a charge on land—was in New Zealand; and, further, to change the amount of the debt would be to affect the security on the land, which was extra-territorial so far as Victoria was concerned.

The proper law of the contract was that of New Zealand. The extent of the security was defined by the debt, and both the debt and the security were fixed by the New Zealand Act, so that to hold that the Victorian Acts applied would be to treat a New Zealand statute as varied in regard to a New Zealand contract by Acts of the Victorian Legislature. Clear and precise words would be needed before an intention could be attributed to the Victorian Legislature to purport to exercise a jurisdiction of that character, whereas a consideration of the relevant sections of the Acts showed their territorial limitation to Victoria. Further, the New Zealand Courts were not required to treat the Acts of the New Zealand Legislature as varied by the Legislature of another State. The debentures, though mortgages within the definition in s. 14, sub-s. 1, were not mortgages to which the Acts applied.

Distinction between obligation and performance discussed.

Adelaide Electric Supply Co. v. Prudential Assurance Co. [1934]

A. C. 122 explained.

Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd. (1932) 48 C. L. R. 391, and *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (1933-4) 50 C. L. R. 581 referred to.

Judgment of the Supreme Court of New Zealand [1936] N. Z. L. R. 54 affirmed.

APPEAL (No. 19 of 1937) from a judgment of the Supreme Court of New Zealand (March 11, 1936) based on the decision of the Court of Appeal of New Zealand (December 11, 1935) answering questions of law submitted to it by the Supreme Court.

The appellants, the Mount Albert Borough Council, a body corporate constituted under the Municipal Corporations Act, 1933, of New Zealand, and a local body within the meaning of the Local Bodies' Loans Act, 1926, for the purpose of securing money borrowed for public works from the respondents, the Australasian Temperance and General Mutual Life Assurance Society, Ltd., a company incorporated in Victoria, Australia, and carrying on business in Australia and New Zealand, issued in New Zealand to the respondents, pursuant to an agreement of September 4, 1926, debentures totalling

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130,000*l.*, bearing interest payable half-yearly at the Bank of New Zealand in Melbourne, Victoria. The debentures and interest coupons were in terms issued under the Local Bodies' Loans Act, 1913 (now 1926). The respondents claimed that the interest due on March 1, 1935, was 369*6l.* 17*s.* 6*d.* The appellants, however, paid 3250*l.*, claiming that that sum was sufficient to satisfy the respondents' rights, on the ground that as the interest was payable at Melbourne, the payment was governed by the Financial Emergency Act, 1931, of Victoria, and amending Acts, which provided (*inter alia*) for a reduction of interest payments on mortgages and other securities. In the action the respondents sought to recover 446*l.* 17*s.* 6*d.* as being the balance short paid in respect of the interest they alleged to be due to them.

The question being purely one of law, Myers C.J. ordered that the following questions of law should be argued and determined in the Court of Appeal of New Zealand:—

"(1.) Whether the Victorian Statutes mentioned in para. 11 "of the statement of defence and counterclaim have any "application to the debentures for 130,000*l.* issued to the "plaintiff by the defendant ?

"(2.) Whether the interest payable under the said debentures "was reduced by the said provisions of the said Victorian "Statutes as provided in s. 19 of the Financial Emergency "Act, 1931, No. 3961 Victoria, as from October 1, 1931 ?

"(3.) Whether if the said Statutes applied the defendants "were entitled to a refund of payments of interest made since "October 1, 1931, in excess of the reduced rate on the ground "of mistake ?"

The terms of the debentures and coupons and the relevant Statutory provisions of both New Zealand and Victoria appear from the judgment of the Judicial Committee.

The Court of Appeal of New Zealand (Myers C.J., Reed, Smith, Johnston and Fair JJ.) unanimously answered the first two questions in the negative. Question three did not therefore arise. The appeal is reported at [1936] N. Z. L. R. 54.

The Mount Albert Borough Council now appealed.

1937. July 22, 23, 26 and 27. *John O'Shea* (of the New Zealand Bar) for the appellants. The law applicable is that of Victoria, the principal and interest being payable in Victoria. At the time when the interest was payable under the coupon both the coupon and the debenture were situated in Victoria, and the Victorian Legislature was competent to deal with them. Payment of the debenture could not be enforced unless it was presented at Melbourne. [Reference was made to the Local Bodies' Loans Acts, 1913 and 1926.] Rates in New Zealand are recoverable by action, and the local authority can apply to the Registrar of the Supreme Court for the land to be let or sold: *The King v. Mayor, etc., of Inglewood*. (1) The right to the interest arises solely under the debenture and the coupon: there is no defence of illegality or impossibility. [Reference was made to the Financial Emergency Act, No. 3961, 1931, of Victoria.] It is admitted that the debenture is a mortgage: see also *Australian Temperance and General Assurance Corporation, Ltd. v. Mount Albert Borough*. (2) The debenture and not the New Zealand statute creates the debt and the security. The mode of performance covers the extent of the obligation. *Auckland Corporation v. Alliance Assurance Co.* (3) is somewhat analogous to this case. The proper law of the contract is Victorian: failing that, the appellants must show that in any event the law regulating the discharge is the law of Victoria. The net result of *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (4) was that full interest had to be paid: reliance is placed on the dissenting judgment of the Chief Justice. (5) The question is, Can the Victorian Legislature change the substance of the New Zealand law? It is submitted that the New Zealand Courts have to apply the *lex loci solutionis* to this matter. This debt is situated in Victoria, and the obligation to pay arises there. The place of payment is conclusive. The first presumption is that it is the law of the place of the contract which applies; but if the

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(1) [1931] N. Z. L. R. 177.

(4) (1933-4) 50 C. L. R. 581.

(2) [1936] N. Z. L. R. 54, 63-4.

(5) Ibid. 596.

(3) [1937] A. C. 587.

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place of payment—the whole of the performance—is in another country, then that absolutely displaces the *lex loci contractus* unless there are some other factors, and the question of the value of those factors only arises in rebuttal. The matter is put in that way by Bowen L.J. in *Jacobs, Marcus & Co. v. Crédit Lyonnais* (1): in that case there is a strong distinction made between a contract wholly to be performed abroad and one partly to be performed abroad.

Enforcement has nothing to do with performance. The performance of this contract, which is the payment of the money on presentation of the coupon, is to be in accordance with the law of Victoria, the *lex loci solutionis*, and, if payment is made in accordance with that law, the contract has been discharged, and the question of enforcing it under the provisions of the New Zealand statute never comes into the picture at all. *Ralli Brothers v. Compañia Naviera Sota y Aznar* (2) deals with more than the mode of performance; it applies to illegality. The authorities lay down that, where the contract is to be wholly performed abroad, the *lex loci solutionis* applies unless special circumstances clearly negative that application. The House of Lords stated the general principles applicable in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (3) As to the general principles of Private International Law, see Cheshire on Private International Law, pp. 181–193, and, as to illegality, p. 197. When the *lex loci solutionis* is set against the *lex loci contractus*, and there are no other paramount considerations, then the *lex loci solutionis* applies, and it is submitted that there are in this case no paramount considerations. [Reference was made to *Provincial Insurance Co. of Canada v. Leduc* (4) and *Lloyd v. Guibert*. (5)] The Victorian Court has jurisdiction over this claim because the obligation, which is a cause of action, is the default in payment: what was sued on was the failure to pay, and that cause of action arose in Victoria: *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*. (6)

(1) (1884) 12 Q. B. D. 589, 601.

(4) (1874) L. R. 6 P. C. 224.

(2) [1920] 1 K. B. 614; [1920] 237–8.

2 K. B. 287.

(5) (1865) L. R. 1 Q. B. 115, 122.

(3) [1934] A. C. 122.

(6) [1937] A. C. 500, 557.

[Reference was also made to *Rouquette v. Overmann & Schou* (1), and to Dicey's Conflict of Laws, 5th ed., p. 711, r. 172, sub-r. 5.] There is no conflict between Victorian law and the provisions of the New Zealand statute that can be claimed to be incorporated in the debenture. *Benaim & Co. v. L. S. Debono* (2) is a strong decision in favour of the appellants here. In *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (3) the trust deed had by express terms to be construed according to the law of Victoria. The principle of *lex loci solutionis* involves a general presumption which covers matters such as currency and exchange: *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (4) [Reference was also made to *Broken Hill Proprietary Co. v. Latham* (5), and *Hamlyn & Co. v. Talisker Distillery.* (6)]

With regard to the question of discharge, the liability arose in Victoria, and the discharge of that obligation is governed by the Victorian statute: discharge is governed by the *lex situs*: *Gibbs & Sons, Ltd. v. Société Industrielle et Commerciale des Métaux* (7); *Winans v. The King* (8); *Royal Trust Co. v. Attorney-General for Alberta* (9); *New York Life Insurance Co. v. Public Trustee* (10); Dicey's Conflict of Laws, 5th ed., pp. 342-3. Where a corporation has an agent which acts as its alter ego for the purposes of payment in such a case as this, it itself is resident in the country. [Reference was also made to Story's Conflict of Laws, 8th ed., p. 476; to *Taylor v. Hollard* (11); Westlake's Private International Law, 7th ed., para. 240, p. 332; *Valery v. Scott* (12); *Swiss Bank Corporation v. Boeh-mische Industrial Bank* (13); and Hibbert's Leading Cases in Conflict of Laws, 1931, 1st ed., pp. 229, 232.] The forum obligationis is Victoria; the obligation arose in Victoria, and what was sued upon was what happened in Victoria, and the Victorian Courts had jurisdiction. The debt arises in

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(1) (1875) L. R. 10 Q. B. 525.

(2) [1924] A. C. 514.

(3) (1932) 48 C. L. R. 391.

(4) [1934] A. C. 122, 151.

(5) [1933] Ch. 373.

(6) [1894] A. C. 202.

(7) (1890) 25 Q. B. D. 399, 405.

(8) [1908] 1 K. B. 1022.

(9) [1930] A. C. 144.

(10) [1924] 2 Ch. 101, 109, 121.

(11) [1902] 1 K. B. 676, 682.

(12) (1876) 3 R. (Sc.) 965.

(13) [1923] 1 K. B. 673, 684.

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Victoria at the time when payment is due, that is the situs of the debt, and the Victorian law is perfectly competent to deal with it. The fact that the debenture was issued in New Zealand is immaterial.

Cyril Radcliffe K.C. and *B. M. Cloutman* for the respondents. Under s. 37 of the New Zealand Local Bodies' Loans Act, 1926, by which, of course, the New Zealand Courts are bound, there is a statutory enactment that the sum of money named in this case in the coupon shall on maturity be a debt due to the holder by the local authority, and shall be payable in the circumstances of this case in Melbourne. The New Zealand Court is bound to give judgment for the actual sum of money written on the face of the coupon, and cannot do anything else. There are three separate points: (1.) What is the proper law of the contract for payment in the debenture? (2.) Assuming the proper law to be that of New Zealand, is the law of the place of performance, Victoria, an excuse for non-performance? (3.) Whether or not the statute in Victoria applies at all in its terms.

[LORD ATKIN. Their Lordships do not desire to hear you on the first point.]

Is there, then, any foundation in law for the proposition that, the proper law of a contract being the law of one country, the fact that an obligation under it has to be performed in another country makes the law of the latter provide an excuse for its non-performance? The outstanding case among the authorities against that proposition is *Jacobs, Marcus & Co. v. Crédit Lyonnais*. (1) The principle underlying that proposition was applied by the Court of Appeal in *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft* (2); but their decision was reversed by the House of Lords, and the exactly contrary principle was applied in *Spurrier v. La Cloche* (3) and *Hamlyn & Co. v. Talisker Distillery*. (4) The passage from Dicey's Conflict of Laws, 3rd ed., p. 609, which is quoted in *Benaim & Co. v. L. S. Debono* (5), is, it is submitted,

(1) 12 Q. B. D. 589.

(2) [1937] A. C. 500, 505.

(3) [1902] A. C. 446.

(4) [1894] A. C. 202.

(5) [1924] A. C. 514, 520.

inaccurate. Dicey is wrong in suggesting that there can be two proper laws, one for the obligation and one for the performance. The right principle is stated by Bailhache J. in *Ralli Brothers v. Compañia Naviera Sota y Aznar*. (1)

With regard to the third point : whether or not on the true construction of the Victorian Financial Emergency Act, 1931, these debentures are a mortgage within the definition of s. 14, it is enough to submit that where there is a mortgage the proper law of which is not Victoria, and the security for which is wholly outside Victoria, it is not within the Financial Emergency Act, 1931. Sect. 28 of that Act again shows how local the legislation is intended to be.

[Counsel was referring to *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (2), which, he submitted, was very near to the present case, when he was stopped.]

John O'Shea replied. The debenture is a specialty contract for the payment of money in Victoria, as also is the coupon. At the time the interest payment is to be made, the coupon must be in Melbourne. The obligation on which the action is really founded is the default of payment in Victoria, and that default took place when the coupon was presented. That cause of action arose in Victoria and the Victorian Legislature has jurisdiction over that obligation. A perusal of the authorities will show that the *lex situs* governs the matter : *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (3) ; *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (4) The debentures are covered by the first part of the definition of "mortgage" in s. 14 of the Financial Emergency Act, 1931, and "public or local authority" refers only to Victorian public or local authorities. Confiscation means the appropriation of a debt : this was not confiscation, it was a reduction of a liability. [Reference was also made to *Spurrier v. La Cloche* (5) ; *Hamlyn & Co. v. Talisker Distillery* (6) ; and *Benaïm & Co. v. L. S. Debono*. (7)]

(1) [1920] 1 K. B. 614, 630.

(2) 50 C. L. R. 581.

(3) *Ibid.* 596.

(4) 48 C. L. R. 391, 409, 413.

(5) [1902] A. C. 446.

(6) [1894] A. C. 202.

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Oct. 18. The judgment of their Lordships was delivered by LORD WRIGHT. This appeal raises a question under that branch of the common law conveniently, though perhaps not quite accurately, described as the conflict of laws. The question is whether the obligation to pay in Melbourne the interest on debentures issued in New Zealand by the appellants is affected by a statute of the State of Victoria reducing the rate of interest. The respondents are a life insurance company incorporated in Victoria and carrying on business in Australia and New Zealand. The appellants are a body corporate constituted under the Municipal Corporations Act, 1933, and control a borough in the suburbs of the City of Auckland. They are a local body within the meaning of the Local Bodies' Loans Act, 1926, which repealed and replaced the Local Bodies' Loans Act, 1913, and earlier Acts. The action was brought by the respondents to recover 446*l.* 17*s.* 6*d.* as being the balance short paid in respect of interest to the respondents as holders of debentures for a total sum of 130,000*l.* issued by the appellants under the circumstances later set out. The respondents claimed that the interest due on March 1, 1935, was 3696*l.* 17*s.* 6*d.*, but the appellants paid 3250*l.* and claimed that this sum was sufficient to satisfy the respondents' rights, on the ground that, as the interest was payable to the respondents at Melbourne, the payment was governed by the Financial Emergency Act, 1931, of Victoria, and amending Acts, which provided for reductions in interest payments. The question is whether the Act applies to the appellants' obligation.

As the question was purely one of law, Myers C.J. ordered that the following questions of law should be argued and determined in the Court of Appeal of New Zealand, namely:—

“(1.) Whether the Victorian Statutes mentioned in para. 11 “of the statement of defence and counterclaim had any “application to the debentures for 130,000*l.* issued to the “plaintiff by the defendant.

“(2.) Whether the interest payable under the said debentures “was reduced by the said provisions of the said Victorian “Statutes as provided in s. 19 of the Financial Emergency “Act, 1931, No. 3961 Victoria, as from October 1, 1931.

“(3.) Whether if the said Statutes applied the defendant “was entitled to a refund of excess payments of interest made “since October 1, 1931, in ignorance of the effect of the said “Statutes, on the ground of mistake.”

The Court of Appeal, after taking time to consider the case, unanimously answered questions (1.) and (2.) in the negative. Accordingly question (3.) did not arise.

For purposes of convenience a specimen debenture No. 1 and interest coupon No. 18 were placed before the Court. The debenture was in the following form :—

“DEBENTURE

“No. 1

£1000.

“MOUNT ALBERT BOROUGH COUNCIL

“of the Borough of Mount Albert, Auckland, New Zealand.

“1926 ROADING LOAN OF 537,500*l.*,

“secured on a Special Rate of Threepence in the Pound on “the rateable value of all rateable property in the Borough of “Mount Albert (with provisions for a Sinking Fund of “one per cent. per annum).

“DEBENTURE FOR 1000*l.* payable at the Bank of New “Zealand, Melbourne, Victoria, on the first day of March, 1963.

“Issued by the Mount Albert Borough Council, of the “Borough of Mount Albert, Auckland, New Zealand, under “‘The Local Bodies’ Loans Act, 1913.’

“N.B.—The holder of this Debenture has no claim in “respect thereof upon the Government or Public Revenues “of New Zealand.

“ON PRESENTATION OF THIS DEBENTURE at the “Bank of New Zealand, Melbourne, on or after the first day “of March, 1963, the bearer thereof will be entitled to receive “1000*l.* (one thousand pounds sterling).

“Interest on this Debenture will cease after the day when “the payment falls due, unless default is made in payment.

“THIS DEBENTURE bears interest at the rate of “5*l.* 13*s.* 9*d.* per centum per annum, payable on the first days “of March and September in each year, on presentation of the “attached Coupons at the Bank of New Zealand, Melbourne.

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"ISSUED under the Common Seal of the Corporation of
"the Borough of Mount Albert, the 31st day of August, 1926.

"(Signed) LEONARD E. RHODES, Mayor.

"(Signed) H. UTTING, Treasurer.

"(SEAL)."

The interest coupon was in the following form :—

"COUPON No. 18.

DEBENTURE No. 1.

"1926 ROADING LOAN OF 537,500*l.*

"OF THE MOUNT ALBERT BOROUGH COUNCIL, OF

"THE BOROUGH OF MOUNT ALBERT, AUCKLAND,

"NEW ZEALAND.

"Issued under 'The Local Bodies' Loans Act, 1913,'
"secured on a Special Rate of Threepence in the Pound on
"the Rateable Value of all Rateable Property within the
"Borough of Mount Albert.

"ON PRESENTATION of this Coupon at the Bank of
"New Zealand, Melbourne, Victoria, on or after the FIRST
"day of SEPTEMBER, 1935, the bearer hereof will be
"entitled to receive 28*l.* 8*s.* 9*d.*

"Leonard E. Rhodes, Mayor.

"H. Utting, Treasurer."

The debentures and interest coupons were issued to the respondents, who at all material times were the bearers of them, in pursuance of an agreement dated September 4, 1926, made between the appellants as borrowers and the respondents as lenders. The agreement was executed under the common seal of the appellants in Mount Albert. A carbon copy was executed by the respondents in Melbourne. The agreement recited that the appellants had taken all necessary steps and had complete authority of law to borrow by way of special loans under the Local Bodies' Loans Act of 1913 various sums of money, totalling in all 750,000*l.*, for specified local improvements, such as road, drainage and other like purposes, secured by special recurring rates to be made and levied upon the rateable value of all rateable property within the borough of Mount Albert. The agreement provided that the respondents should pay to the appellants the moneys

agreed to be lent at the respective dates specified at a bank in Auckland, and in return the appellants should hand over to the respondents the debentures and interest coupons in the form agreed. This was in fact done, and the appropriate number of debentures and interest coupons, specimens of which are set out above, were duly delivered by the appellants to the respondents.

As the debentures and coupons were in terms issued under the Local Bodies' Loans Act, 1913, it is necessary to refer to the material provisions of that Act, which deals generally with the special loans of local bodies in New Zealand. It will be referred to as the Loans Act. The Loans Act of 1926, now in force, has been used in the argument of this appeal, the sections relevant to this case being identical, save in respect of numbering in some cases, with the corresponding sections of the Loans Act of 1913.

The Loans Act requires that certain preliminary steps for the obtaining of the consent of the ratepayers should be taken. These conditions the appellants, as a local body acting under the Loans Act, had duly fulfilled. The other provisions which seem to be here material relate to the raising of the loan by the issue of debentures which are to be in the form prescribed by the Act. That statutory form was complied with in the debentures now being considered. Debentures and coupons were to be transferable by delivery and payable to bearer, as were those in question. As security for a loan the local body was empowered to pledge (*inter alia*) a special rate made and levied for the purposes of the special loan. In the present case, as appears on the face of the debenture, the loan was secured on a special rate of threepence in the pound on the rateable value of all rateable property in the borough of Mount Albert (with provisions for a sinking fund of 1 per cent. per annum). This sinking fund, which was duly created, was in accordance with the Loans Act, which provided that the sum of money named in any debenture and in any coupon should on maturity be a debt due to the holder by the local authority, payable at the place within or out of New Zealand named in the debenture, and

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that for the purposes of such repayment a sinking fund might be created by the appropriation and pledging of part of the local fund. The provisions of the Loans Act dealing with a case of default in paying the sums secured are important. They enable the Supreme Court of New Zealand, on petition, to appoint a receiver of such part of the local fund or other property of the local authority as is charged for payment of the debenture or coupon. On the appointment of a receiver all such property is to vest in him, and he is to have powers of sale of such property.

It is clear that the charge on the rates is a charge on land in New Zealand: *The King v. Mayor, etc., of Inglewood* (1), citing *Payne v. Esdaile*. (2)

It is now necessary to advert to the Victorian statute which is relied on by the appellants as reducing the rate of interest payable under the debentures. That statute is the Financial Emergency Act, 1931, No. 3961, as amended by the Financial Emergency Act, 1932, No. 4106. The recital to the Act of 1931 stated that it was desired to devise measures for meeting the grave financial emergency existing in Australia and thereby averting disastrous consequences, and that a plan had been devised for re-establishing the financial stability of the Commonwealth and States and restoring industrial and general prosperity by means involving a common sacrifice, and including, among other things, certain reductions in the expenditure of the Commonwealth and State Governments and the conversion of the internal public debts of the Commonwealth and States on the basis of a reduction of the interest payable. Part III. of the Act dealt with (inter alia) "Reduction of interest on mortgages and "other securities." Sect. 14, sub-s. 1, defined the Court for purposes of the Act as the Supreme Court (S. C. of Victoria) or a judge, or in certain cases a Court of Petty Sessions. Mortgage was thus defined:—

"'Mortgage' means any deed memorandum of mortgage "instrument or agreement whereby security for payment of "money is granted (whether by virtue of such deed memorandum

(1) [1931] N. Z. L. R. 177, 202.

(2) (1888) 13 App. Cas. 613, 626.

"instrument or agreement or of any Act) over real or
 "personal property or any interest therein; and without
 "affecting the generality of this definition, includes a mortgage
 "given as security for moneys granted by a bank or corporation
 "on overdraft; and also includes—

"(a) any debenture inscribed stock or mortgage issued
 "created or given by any public or local authority."

The words "public or local authority" are later defined as meaning any local authority within the meaning of the Public Contracts Act, 1928, and as including the State Electricity Commission of Victoria, the Country Roads Board and similar bodies, and any municipality, including the City of Melbourne and the City of Geelong.

Sect. 14, sub-s. 1 (b), adds as coming within the word "mortgage": "An agreement for sale and purchase of real or
 "personal property under which interest is payable in respect
 "of the whole or any portion of the purchase money."

It is not here necessary to quote the remaining definitions in the section. Sect. 19, sub-s. 1, is the governing section for purposes of this appeal. It is in the following terms:—

"Except as hereinafter provided every mortgage shall for
 "a period of three years from the date of the coming into
 "operation of this Division be construed and take effect as if
 "it were a term of the mortgage that on and from the coming
 "into operation of this Part or (in the case of a bank or
 "pastoral company overdraft or in the case of a mortgage
 "given to a society registered under the Building Societies
 "Act, 1928) on and from the appointed day or the prescribed
 "day (as the case may be) the interest payable under the
 "mortgage should be reduced at a rate equivalent to four
 "shillings and sixpence for every pound of such interest."

The period was subsequently extended, and the provision was in force at the material date. Under the Act interest was not to be reduced to a rate less than five pounds per cent. per annum. It was also enacted that a mortgagee was entitled to apply to the Court for an order excluding or modifying in certain events the operation of this section of the Act; if the application was made to petty sessions it

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was to be made to the Court of petty sessions held nearest to the location of the property the subject of the mortgage.

Sect. 28, sub-s. 1, entitled a mortgagor to apply to the Court where, under the mortgage, any interest accrued due and payable was not in arrear, or not more than six months' interest due and payable was in arrear, for an order that the mortgagee should not within a period of twelve months after the coming into operation of this Part of the Act exercise in respect of the property comprised in the mortgage any power of sale or foreclosure or other remedy for enforcing payment of the principal moneys thereby secured or interest if any in arrear at the time of such application.

Sect. 37 was as follows: "Nothing in this Part shall apply "to any mortgage given as security for moneys raised by any "public or local authority by way of loan outside Australia."

The above provisions of the Act have been set out in detail as bearing on the question which goes to the root of this appeal, which is whether the Financial Emergency Acts entitle the appellants to rely on them in the New Zealand Courts in regard to the debentures and interest coupons. If they do not, then the defence based on s. 19, sub-s. 1, fails. Their Lordships agree with the unanimous judgment of the judges of the Court of Appeal that the Acts do not furnish a defence to the appellants for various reasons. But it will be convenient, before developing these reasons, to deal with some general considerations.

The debentures and the interest coupons in so far as they give a security on real property, namely, a portion of the local rate in New Zealand, are beyond question governed by the New Zealand law. The security can be enforced only in the Courts of New Zealand and in the manner provided by the Loans Act. It is not disputed that these rights are governed by New Zealand law. But in their Lordships' judgment it is equally true that the personal obligation to pay is a New Zealand contract, governed by New Zealand law. It seems impossible to sever this personal covenant from the mortgage provisions which secure it. Indeed, the

whole tenor of the transaction is only consistent with its being governed by New Zealand law. The loan was agreed in New Zealand, the money under the loan was paid by the respondents to the appellants there. The appellants were a statutory body in New Zealand which in borrowing were acting under the statutory powers contained in the Loans Act as set out above. The respondents carried on business in New Zealand as well as in Australia. It is true that the place of repayment of the loan, and of payment of interest from time to time, was to be Melbourne, in Australia. But even that was fixed in accordance with s. 32 of the Loans Act of 1913 (s. 37 of the Act of 1926), which required payment of the debt to be at the place within or out of New Zealand named in the debenture, so that the obligation to pay has statutory sanction. Mr. O'Shea, in his able and exhaustive argument, has contended that the payment is governed by Victorian law because Victoria is the place of performance, and that Victorian law for this purpose includes s. 19, sub-s. 1, of the Financial Emergency Act. He further contends that s. 19, sub-s. 1, applies to the debt because it is a specialty debt and the coupon, which is the document of title, must necessarily be presented at the place of payment in Melbourne when payment is due and demanded, and thus at the relevant moment the *lex situs* applies so as to introduce the statutory reduction of interest. Their Lordships are not prepared to accept either contention. While they think that the *lex situs* applies to the security in New Zealand, they do not think that the *lex situs* of the actual coupon can be applied to the instrument, whether or not the personal obligation to pay is properly regarded as a specialty debt. Nor can they accept the view that the obligation to pay is here governed by the place where it is stipulated that payment is to be made, in the sense that the amount of the debt, as expressed in the instrument creating it, can lawfully be varied by the Victorian Financial Emergency Act so as to bind a foreign jurisdiction, or indeed at all. So to hold would be, in their Lordships' judgment, to confuse two distinct conceptions, that is, to confuse the obligation with the performance of the obligation.

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It is well established in the law of England and of New Zealand, which in this respect follows it, that the proper law of a contract has to be first ascertained where a question of conflict of laws arises.

The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case *prima facie* their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract. No doubt there are certain *prima facie* rules to which a Court in deciding on any particular contract may turn for assistance, but they are not conclusive. In this branch of law the particular rules can only be stated as *prima facie* presumptions. It is not necessary to cite authorities for these general principles. Sometimes their application involves difficulty ; but not in this case. It has been already pointed out that there are, in their Lordships' opinion, such circumstances as lead to the inference that in the present case the proper law of the contract is the law of New Zealand, and accordingly that law should *prima facie* govern the rights and obligations to be enforced under the contract by a Court before which the matter comes, a *fortiori* a New Zealand Court. It is true that, when stating this general rule, there are qualifications to be borne in mind, as for instance, that the law of the place of performance will *prima facie* govern the incidents or mode of performance, that is, performance as

contrasted with obligation. Thus in the present case it is not contested that the word "pound" in the debenture and coupon is to be construed with reference to the place of payment, and as referring to the "pound" in Victorian currency. Again, different considerations may arise in particular cases, as, for instance, where the stipulated performance is illegal by the law of the place of performance. But there is no question of illegality here, since the Victorian statute is not prohibitory.

Mr. O'Shea relied on certain expressions used in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (1) as indicating that the House of Lords there laid down that the law of the place of performance applied for all purposes relating to performance, even to the extent of changing the substance of the obligation expressed or embodied in the contract, with the result in the present case that the amount of the interest was reduced by the effect of the Financial Emergency Acts. Their Lordships cannot accept this reading of the *Adelaide* case. (1) The House of Lords was not concerned there with any such general questions, or with questions of the substance of the obligation which, in general, is fixed by the proper law of the contract under which the obligation is created. The House of Lords was concerned only with performance of that obligation, in regard to the particular matter of the currency in which payment was to be made. There was no question such as a reduction in the amount of the debt or liability, or other change in the contractual obligation. The House of Lords had no intention of questioning the distinction emphasized in *Jacobs, Marcus & Co. v. Crédit Lyonnais* (2) between obligation and performance. Indeed, that line of authorities was not referred to either in argument or in the speeches. It may be that in some cases difficulties have arisen in distinguishing "obligation" from "performance," and that "manner and mode of performance" may affect the value of the obligation. But the Victorian Statute here is in express terms directed to "obligation," that is, to the construction and effect of the mortgage, and the reduction of the covenanted rate of interest.

(1) [1934] A. C. 122.

(2) (1884) 12 Q. B. D. 589.

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In *Auckland Corporation v. Alliance Assurance Co.* (1) this Board has recently adverted to that distinction between obligation and performance. (2) This way of considering the present case has been fully elucidated in the very careful judgments of the Court of Appeal. Their Lordships do not desire to be thought to express any dissent from these judgments in so far as they hold that the Financial Emergency Acts do not operate to reduce the amount of the interest in this case, or proceed on the ground that to recognize the application of the Acts, as the appellants contend should be done, would not be to apply the law of the place of performance to the performance of the contract, but to apply it so as to change the substance of the obligation, because according to the appellants' contention the Acts would be applied to change the amount payable, which is a matter of obligation and is not a mode or manner of performance. But their Lordships do not feel it necessary to pursue this aspect of the case at any greater length, or to give any final opinion upon it, because they think that the appeal can be determined on the single ground that, in their Lordships' judgment, which again agrees with that of the Court of Appeal, the Financial Emergency Acts do not apply to these debentures, or to the interest payable under them. This is the subject of Questions No. 1 and No. 2 quoted above, which the Court of Appeal have answered in the negative, holding that the Victorian statutes have no application to the debentures or coupons.

It is true that the debentures are mortgages in the sense in which the mere word mortgage is used in s. 14, sub-s. 1, of the Act of 1931. But they are not, in their Lordships' judgment, mortgages within the meaning of the Acts. To hold that the Act applied to the debentures would be to attribute to the Victorian Legislature an intention to legislate in regard to matters lying outside its territorial jurisdiction, because the land charged under the debenture is in New Zealand. The authority vested by the Victorian Constitution in the Legislature of the State of Victoria is to legislate for the peace, order and good government of Victoria. It is true that the

(1) [1937] A. C. 587.

(2) Ibid. 606.

principal moneys and the interest are payable in Victoria, but they are payable under New Zealand contracts and, furthermore, to change the amount of the debt would be to affect the security on the land, which is extra-territorial so far as Victoria is concerned. There are the further points that the extent of the security is defined by the debt, and that both the debt and the security are fixed by the New Zealand statute, so that to accede to the appellants' contention would be to treat a New Zealand Act as varied in regard to a New Zealand contract by Acts of the Victorian Legislature.

Clear and precise words would be needed before an intention could be attributed to the Victorian Legislature to purport to exercise a jurisdiction of this character. But a careful consideration of the terms of the sections quoted above shows that, though the general definition of mortgage in s. 14, sub-s. 1, is wide enough to cover any mortgage of any land anywhere in the world, the intention of the Acts is to limit it to Victorian mortgages. This appears (*inter alia*) from the definition of public or local authority, which could not apply to the appellants, because it is limited to such bodies in Victoria. The Court as defined is a Court in Victoria. If application is made to a court of petty sessions, it must be made to the court of petty sessions held nearest to the location of the property which is the subject of the mortgage. Sect. 28 relates to applications to a Victorian Court, which again, if made to a court of petty sessions, must be to the Court held nearest to the location of the property which is the subject of the mortgage. Sect. 37 is clearly limited to Victorian bodies. These and other indications show the territorial limitation of the enactments. It is not necessary to rely on the recitals, which, however, seem to show that the purpose of the Acts had reference to internal debts in Victoria, and not to the relief of foreign debtors. These particular considerations confirm the general presumption which always exists against a Legislature exceeding its legitimate jurisdiction, and seem to their Lordships to be sufficient, without more, to justify the decision of the Court of Appeal that these Victorian statutes have no application to the debentures or to the interest. The

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debentures, though mortgages, are not mortgages to which the Acts apply.

But the material question may be stated in even narrower terms as being whether the Court of New Zealand ought to give effect to these Victorian statutes. The matters concerned are mortgages of land (that is, the local rates which issue out of the land) situate in New Zealand. The charge is subject to New Zealand statutes, which also define and sanction the obligation to pay the debts, both principal and interest. The machinery for enforcing the security is also provided for by the statute. No other Court anywhere in the world has jurisdiction to enforce the security. The New Zealand Courts are, *prima facie* at least, bound to give effect to the New Zealand statutes. Their Lordships cannot accept so anomalous a conclusion as that the New Zealand Courts are required to treat the Acts of the New Zealand Legislature as varied by the Legislature of another State. Their Lordships do not think that such a result was contemplated or intended by the Victorian Legislature.

Two important cases decided in the High Court of Australia having a bearing on the question just debated have been cited to the Board. These cases have not been argued before their Lordships, but referred to by way of illustration, and their Lordships do not express any final judgment upon them. All their Lordships desire to say here is that they do not conflict with what is said in the present judgment. In each case the appeal was from the Courts of the State which had enacted the legislation. The earlier was *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1) The questions arose under the same Victorian statute as is material in this appeal—the Financial Emergency Act, 1931. The High Court was called upon to decide whether s. 19, sub-s. 1, applied to the debentures of the respondent company. The debentures were secured by a trust deed executed and kept at Melbourne, which created a fixed charge over real property in Tasmania and a floating charge over the rest of the company's property in other places. Interest was payable in Melbourne or London. But

the essential circumstances on which the High Court, or at least the majority of the Court, acted in holding that the law of Victoria governed the transaction, so that s. 19, sub-s. 1, applied to these debentures, was that it was a term of the trust deed that "these presents shall be construed according to the law of the State of Victoria," and the debentures charged the property in terms of the trust deed. This provision was held (at least by the majority of the Court) to bring within the scope of the Act the debentures, which had a Victorian element. It was accordingly held that the interest was reduced under the Act. The reasons given by the judges are not entirely uniform. Rich J. was content to say that the Act applied because the debentures being transactions which in a real and practical sense concerned Victoria, it was clear that the governing law of the obligation was, as it was expressly agreed to be, Victorian. Starke J. held that the scope of the Acts extended to every mortgage of property in Victoria, and every mortgage given or to be performed in Victoria, and every mortgage of which the proper law of the contract was that of Victoria. Dixon and McTiernan JJ. found a sufficient reason in the circumstance that the governing law of the debentures was Victorian. Evatt J. based his decision on the term in the trust deed. He said (1) : "The parties themselves, not the 'Victorian Legislature, 'intended' their rights and liabilities 'to be ascertained and enforced by reference to the Victorian 'law of mortgages, and, for this purpose, their agreement is 'meaningless unless it implies that the general law of Victoria 'is to be applied to the transaction, without paying regard to 'the limited territorial application, which is a characteristic 'and inevitable feature of all Victorian laws." It seems clear that none of the reasons which induced the High Court to arrive at their conclusion would apply to the attitude to be adopted by the New Zealand Court in regard to the Victorian legislation on the facts of the present appeal.

The other case cited from the High Court of Australia was *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society*. (2) The borrowers in that case

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(1) (1932) 48 C. L. R. 435.

(2) (1933-4) 50 C. L. R. 581.

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were a New Zealand corporation subject to the Loans Act, the lenders were another Australian insurance company. The debentures in question were secured on the Local Body's rate in New Zealand. The question was whether the New South Wales Interest Reduction Act, 1931, applied to the interest payable in New South Wales upon the debentures. The action was brought in New South Wales. It was held by the majority of the High Court that the Act did not apply to reduce the interest. Of the majority Dixon J. held that under the language of the Act it only extended to obligations arising under the law of New South Wales, and did not include an obligation which arose under and was governed by the law of New Zealand. Evatt J. found the guiding clue in s. 17 of the Interpretation Act, 1897, of New South Wales, which limited, unless the contrary intention should appear, the operation of New South Wales Acts to matters and things "in and of" New South Wales. McTiernan J. expressed the same view. This authority seems on the whole to support the view that the debentures and interest in question in this appeal are outside the scope of the Victorian Act. There is no corresponding Interpretation Act in Victoria; but it seems that a similar legislative limitation should be deduced from the general principles of the Victorian Constitution.

On the whole case their Lordships are of opinion that the New Zealand Court of Appeal was right in refusing to give effect, in the circumstances of the case, to the Financial Emergency Acts, and that the appeal should be dismissed with costs. They will humbly so advise His Majesty.

Solicitors for appellants : *Gamlen, Bowerman & Forward.*

Solicitors for respondents : *Hewitt, Woollacott & Chown.*

[PRIVY COUNCIL.]

SOLLOWAY AND ANOTHER APPELLANTS ; J. C.*

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McLAUGHLIN RESPONDENT. Oct. 29.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Ontario—Broker—Share transactions—Shares bought for client not retained and shares deposited by client sold by brokers—Subsequently repurchased for delivery at lower price—Fraudulent scheme—Nature of dealings unknown to client—Conversion—Measure of damages.

A client instructed his stock brokers to buy for him a number of shares of a certain company on margin at the then market price, and at the same time he deposited with the brokers shares of the same company as margin. He received a contract note purporting to show that the transaction had been carried out in accordance with the rules of the appropriate stock exchange. The shares having declined in value, the client received requests for further margin, and he thereupon deposited with the brokers more of the same class of shares and also paid a sum in cash. He had received monthly statements showing the shares as being carried for him. The stock brokers, however, while purporting to buy, and in fact making valid contracts of purchase for their clients, contemporaneously sold shares of the same company and used their client's shares to complete those sales. They also sold at once the shares which the client had deposited as margin. When, at a later date, the client closed his account, the stock brokers went into the market and bought the necessary number of shares at the then market price, which was substantially lower than that ruling at the date when the client gave his original order to buy and deposited shares as margin, and delivered them to the client :—

Held, that the transactions were part of a fraudulent system of business, and were themselves fraudulent in their inception, continuance and completion. A broker, although not under an obligation to retain for his client the specific shares which might be delivered to him under the contract made for his client, had, however, to get into his possession and retain an equivalent number of shares.

With regard to the shares originally ordered by the client the brokers were employed as agents but, having engaged in a scheme to defraud their principal, they were not, as they would otherwise have been had they honestly fulfilled their mandate, entitled to an indemnity against the price which they had paid

* *Present* : LORD ATKIN, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

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to the sellers for those shares. The principal, therefore, on discovery of the fraud, was entitled to recover back the money paid on the footing of an honest transaction, giving credit for the value of the shares at the time he received them.

As to the deposited shares, the brokers never had any right to deal with them, and on the facts of this case, involving fraudulent misuse, their disposal of them amounted to conversion, and the client, who at the time he received and retained the shares or their equivalent from the brokers did not know of the conversion, was entitled to damages measured by the value of the shares at the date of the conversion less the value of the shares received at the time he received them.

Dictum of Willes J. in *Edmondson v. Nuttall* (1864) 17 C. B. (N. S.) 280, 294, referred to.

Judgment of the Supreme Court of Canada [1936] Can. S. C. R. 127 varied.

APPEAL and CROSS-APPEAL (No. 69 of 1936) from a judgment of the Supreme Court of Canada (February 28, 1936) reversing in part a judgment of the Court of Appeal for Ontario (June 5, 1934), which latter judgment had reversed a judgment of Kerwin J. (June 13, 1933), who had affirmed the decision of the Assistant Master (January 30, 1933).

The action out of which this appeal arose was brought by the respondent, J. P. McLaughlin (appellant in the cross-appeal), against two companies named Solloway Mills & Co., Ltd., one registered in Ontario and the other in the Dominion, and against the present appellants, Isaac Solloway and Harvey Mills, two directors of the companies (respondents in the cross-appeal). The Dominion company dropped out of the proceedings before trial. The claim arose out of transactions which the plaintiff had in 1929 and 1930 with the Ontario company, which carried on business as stock brokers. On October 16, 1929, the plaintiff instructed the company to buy for him 7000 shares of Sudbury Basin Mines, Ltd., on margin at market price, then \$7 a share. At the same time he deposited 3500 shares of Sudbury Basin Mines, Ltd., as margin. He duly received a contract note purporting to show that the transaction had been carried out. The shares declined in value and requests were made from time to time by the company for further margin or cash. In compliance with those requests, and in the course of transactions between

October and December, 1929, he deposited with the company a further 10,500 shares of the Sudbury company and paid \$8000 cash. He received monthly statements showing the shares as being carried for him. On January 13, 1930, he decided to close the account, when the balance against him as shown in the books of the company was \$42,334.92. He paid that sum and was given delivery of 21,000 shares—representing the 7000 originally bought to his order, the 3500 originally deposited, and the 10,500 subsequently deposited.

In the action the plaintiff alleged that the Ontario company did not purchase the 7000 shares in 1929 and hold them on his account, but had, on January 13, 1930, when he closed the account, purchased 7000 shares to satisfy his demand for delivery at prices ranging from \$2.90 to \$3.40 a share, and had likewise purchased shares to replace the shares deposited as collateral 11,800 of which, the plaintiff alleged, had been sold by the company as soon as he had deposited them with the company. He claimed (inter alia) \$33,320.00 as the profit made by the defendants on the sale of 11,800 shares of the Sudbury company delivered by the plaintiff to the defendant company and sold by it and repurchased for delivery to the plaintiff at a lesser price; the recovery of \$28,637.50 paid by the plaintiff to the defendant company upon the representation that the defendant company had paid for the account of the plaintiff \$48,937.50 for 7000 shares of the Sudbury company, when in fact it paid \$20,300.00: \$100,000 damages.

The appellants by their defences denied that they had any business transactions with the plaintiff; that they made any representations to him; or that they conspired as alleged or at all.

The Assistant Master found that the amount due to the plaintiff from the appellants and the Ontario company was \$65,129.92, and Kerwin J. confirmed that report with an arithmetical correction of the amount found to be due to \$55,922.98.

The Court of Appeal for Ontario (Mulock C.J.O., Riddell, Middleton, and Davis JJ.A., Macdonnell J.A. dissenting)

J. C. dismissed the action as against the present appellants
 1937 (see [1934] O. R. 464).

SOLLOWAY The Supreme Court of Canada (Duff C.J., Lamont, Cannon,
 v. Crocket and Dysart JJ.) unanimously allowed the plaintiff's
 McLAUGHLIN. appeal, but reduced the amount of the judgment to \$28,281.40
 and interest. The appeal is reported at [1936] Can. S. C. R.
 127.

The defendants now appealed, and the plaintiff cross-appealed.

1937. July 15, 16, 20 and 22. *Cyril Radcliffe K.C.*, *Wilfrid Barton K.C.*, and *R. I. Ferguson* (of the Ontario Bar) for the appellants. It has throughout been objected that the Assistant Master had no jurisdiction to conduct a trial of this action. It was referred by consent to "the Master" under ss. 67 and 90 of the Judicature Act, R. S. O., 1927, c. 88, and was delegated by him to the Assistant Master, and it is contended that where a reference is made by consent to a named person he cannot delegate the trial of it to somebody else. [Reference was made to the Judicature Act, R. S. O., 1927, c. 88, ss. 67, 79, 90; and to the Statute Law Amendment Act, 1932, S. O. 22, Geo. 5, c. 53, s. 10, which amended s. 1 of the Judicature Act by adding that "Master of the Supreme Court" shall include Assistant Master.] The Master was the person elected by the parties, and if he had died there would have had to be a new reference.

It is submitted, first, that there was no right to sue in conversion; and, secondly, that the damages must allow for the sum which the respondent would have had to pay before he could obtain possession of the property. If that be so, he has to allow the whole of the debt, some \$49,000, before he can claim damages for the conversion of his shares and, as they were not of a market value at the time of the sale greater than \$7 a share, the damages become merely nominal. The principle in *Johnson v. Stear* (1) has been applied again and again in all sorts of transactions. If the claim does not lie in conversion, what, then, is the nature

(1) (1863) 15 C. B. (N. S.) 330.

of the claim arising out of these transactions? So far as it can be proved by evidence that there was by these brokers—agents—a dealing with the client's property resulting in profit to the broker, the client can then by any rule of equity or common law elect to adopt the impugned transactions and obtain the benefit of the dealings which were originally wrongful. The result of that, however, is that although the profits may be had from the broker, unless they can be actually traced as such into the hands of other persons with knowledge, the remedy cannot be carried against them.

[LORD ATKIN referred to *Burn v. Morris*. (1)]

[Reference was also made to *Langton v. Waite*. (2)] Next, it is submitted that the action of the respondent in taking a judgment for secret profits against the Ontario company prevented him from running his case in an opposite direction against the individual defendants (the appellant directors). It is, if established, a pure and simple case of election, and is the application of the old rule that a person is not allowed to blow hot and cold at the same time: *Buckland v. Johnson* (3); *Smith v. Baker* (4); and *Codling v. John Mowlem & Co., Ltd.* (5) There was no evidence of any conspiracy: if there was any such evidence, the respondent proved no damages. The measure of damages is, as in every case of tort, the loss of the person whose rights are infringed, not the profits of the tortfeasors, and the respondent, having got his shares at the price he agreed to pay, and having received back his collateral securities undamaged, showed no damages on which to ground an action in tort. Lastly, with regard to the connection of the directors (appellants) with the frauds alleged to be proved against the company, it is submitted that there is no evidence from which it could properly be inferred that they were parties to them. [Reference was also made to *Solloway v. Johnson*. (6)]

Wilfrid Barton K.C. followed, and on the question of election or waiver referred to *Brewer v. Sparrow*. (7) This

(1) (1836) 2 Cr. & M. 579.

(2) (1868) L. R. 6 Eq. 165, 173.

(3) (1854) 15 C. B. 145.

(4) (1873) L. R. 8 C. P. 350.

(5) [1914] 2 K. B. 61, 66.

(6) [1934] A. C. 193.

(7) (1827) 7 B. & C. 310.

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was a claim for secret profits. The transaction must be considered as entirely one in which the agent's dealings are affirmed throughout, and one in respect of which the respondent has claimed to recover secret profits, and having so elected he must be limited to that claim. As to conspiracy, the respondent was damaged by the fall in the market, and not by the dealing in his property. When goods have been withheld, the damages for conversion must be limited to the damage which is a necessary consequence of the conversion, and the damage resulting from the fall in the price of the stock is not, it is submitted, a necessary consequence of the conversion: *Moon v. Raphael*. (1)

J. C. McRuer K.C. and *F. A. Brewin* (both of the Ontario Bar) for the respondent (appellant in the cross-appeal). There was a broad general conspiracy to set up this particular system of trading, and to represent to the public generally, and to the respondent in particular, that the company were trading as honest brokers, and the appellants are equally liable with the company for the damage sustained by the respondent. Pursuant to the scheme or system fraudulent statements of account were rendered to the respondent concealing the manner in which his shares had been dealt with, and he is entitled to recover as damages against all parties to that system the amount of the secret profits made by any one of the parties. His right to recover damages for the loss caused to him by the fraudulent transactions does not depend upon affirmance or disaffirmance of the wrongful disposal of his shares. The Assistant Master had jurisdiction to try the action. As a result of the fraudulent system the company never entered into any contract which bound the respondent, and he was never under any obligation to take up the shares.

The Supreme Court held that the retention of the shares by the respondent defeated the claim in conversion. It is submitted that that is an erroneous view. If the company received the collateral from the respondent pursuant to a fraud, and his cause of action for receiving the collateral arose

at that moment, and the company disposed of it on the same day that it was deposited, then, if that fraud had not been concealed from the respondent, he would have been in a position to claim the value of the shares at the date when the fraud was perpetrated. That being so, the company cannot be put in any better position because they consistently concealed the fraudulent scheme until they had an opportunity of buying in again at a lower price and completing the fraud by returning those securities to the respondent. On the question of loss, see *Archer's Case*. (1) Further, the concealment of a fraud is itself a fraud, and actionable: *John v. Dodwell & Co.* (2) On the question of election reference was made to *Rice v. Reed* (3) and *Kettlewell v. Refuge Assurance Co.* (4) The decision of the Assistant Master was perfectly right.

Cyril Radcliffe K.C. replied. With regard to the cross-appeal, assuming that the Board are in favour of the claim by Mr. McLaughlin as upheld by the Supreme Court, the result is that he gets back everything that he actually paid in connection with this transaction—the \$49,000 odd. His claim on the cross-appeal is to make something more out of the transaction than that. He wants to get back not only everything that went from him, but something more by way of what he calls damages for loss. Until he came before this Board he has never put this claim on the collateral as a claim for damages. It is said that, treating him as the owner of the property, he has suffered damage because between the dates when the collateral was deposited and the date when something which in every sense is much the same was returned to him, the market value of the shares had fallen. It is submitted that unless there was something in the nature of special damage—that is, that there was some chance that he might express a wish to deal in the shares in the interim—he suffered no damage at all when he received just as many shares back. He has got back exactly the property the loss of which he complains of. On the evidence he did not want

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(1) [1892] 1 Ch. 322, 337.

(2) [1918] A. C. 563, 573.

(3) [1900] 1 Q. B. 54.

(4) [1908] 1 K. B. 545.

J. C. the shares during the period he was out of possession of them.
1937 The return of the "goods" does not, of course, absolve the
SOLLOWAY tort unless there is a special agreement to that effect. The tort
v. is still there, but there is not a vested cause of action to sue
McLAUGHLIN. for the value of the goods at the date of the conversion: there
is a cause of action, which is the right to sue for damages for
conversion of the goods, and at the trial it will be for the
Tribunal to assess the damages and determine whether there
is any special damage that ought to be allotted in addition
to the return of the goods. If a person owns goods which
are in a safe, and through a period when he believed that
they were in the safe somebody else had abstracted them
and used them, but put them back into the safe before the
owner wanted them, it is submitted that there are no damages
in conversion except nominal damages.

F. A. Brewin replied. The chief point of the reply to the
cross-appeal is that, as there was no intention on Mr.
McLaughlin's part to use in the meantime the shares which
had been converted, he had suffered no damage. The simple
answer to that is that that situation cannot be relied on when
it was the company's own fraud which created it.

1937. Oct. 29. The judgment of their Lordships was
delivered by LORD ATKIN. These are an appeal and a
cross-appeal from decisions of the Supreme Court of Canada
in an action brought in the High Court of Ontario by
the present respondent against two companies named
Solloway Mills & Co., Ltd., one registered in Ontario and
the other in the Dominion, and against the present appellants,
Mr. Isaac Solloway and Mr. Harvey Mills, two of the
directors of the companies. The action was tried before
an Assistant Master, Mr. Lennox, who reported that there
was due to the plaintiff from the Ontario company and the
appellants the sum of \$65,129.92. The Dominion company
had dropped out of the proceedings. On appeal by the
present appellants from the Master's report, Kerwin J. con-
firmed the report with an arithmetical correction of the
amount found to be due to \$55,922.98. On appeal, the Court

of Appeal dismissed the action as against the present appellants, Macdonnell J.A. dissenting. On appeal by the plaintiff the Supreme Court allowed the appeal, but reduced the amount of the judgment to \$28,281.40 and interest. The two director defendants appeal, and the plaintiff cross-appeals.

The claim of the plaintiff arose out of transactions which he had with the Ontario company in 1929 and 1930. The company purported to carry on business as stock brokers, having acquired in 1928 the business of that nature which had been started by the two appellants in 1927. The company were members of the Standard Stock and Mining Exchange in Toronto. On October 16, 1929, the plaintiff instructed the company to buy for him 7000 shares of Sudbury Basin Mines, Ltd., on margin at market price, then \$7 a share. He at the same time deposited 3500 shares of Sudbury Basin Mines, Ltd., as margin. He duly received a contract note purporting to show that the transaction had been carried out in accordance with the rules of the appropriate Stock Exchange which, in the present case, was the Standard Stock and Mining Exchange in Toronto. The shares steadily declined in value, and requests were made from time to time by the company for further margin or cash. The plaintiff duly complied with these requests, so that in the course of the transactions between October and December inclusive he deposited with the company a further 10,500 shares of the Sudbury company and paid \$8000 cash. He received monthly statements showing the shares as being carried for him. On January 13, 1930, the plaintiff decided to close the account. The balance against him on that date appeared to be \$42,334.92. He paid that sum and was given delivery of 21,000 shares, i.e., 7000 originally bought, 3500 originally deposited, and 10,500 subsequently deposited. It now appears that the transactions as far as the company were concerned were part of a fraudulent system of business, and were themselves fraudulent in their inception, continuance and completion. The company purporting to buy, and in fact making valid contracts of purchase for their clients, contemporaneously sold shares of the same company and used their client's shares

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J. C. to complete these sales. The shares are in the form familiar
1937 in American companies and with a blank transfer endorsed
SOLLOWAY pass in a similar manner to bearer shares.

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McLAUGH- A broker is not considered to be under an obligation to
LIN. retain for his client the specific shares which may be delivered
to him under the contract made for his client. But he has,
of course, to get into his possession, and retain, an equivalent
number of shares. Under the fraudulent system of the
company they were throughout the course of this transaction
“ short ” of these Sudbury Basin shares by about 100,000
shares, involving, no doubt, similar frauds on other clients.
In other words, they were bears when their clients were
bulls ; they correctly anticipated the fall of the market,
and when their clients demanded the shares they went into
the market and bought them at the fallen price to their own
substantial profit. The same course was adopted with the
shares deposited as margin. The company sold them as
soon as they were deposited, without any lawful excuse even
if the transaction had been in every other respect regular.
When they were claimed by the plaintiff an equivalent number
was bought in the market and delivered to the plaintiff with
further profit to the company. It was disputed that the
two appellants were parties to the fraud. Their Lordships
agree with the Assistant Master, Kerwin J. and Macdonnell
J.A., and the learned judges of the Supreme Court that it
was established that both the appellants were privy to, and
took part in, the fraud throughout. They find it unnecessary
for them to discuss this contention.

What, then, are the rights of the plaintiff in this state of
facts ? The Assistant Master gave him the full amount at
which he had been charged for the 7000 shares bought, and
also the price at which the company had realised the deposited
shares, crediting the defendants with the market value of
the shares at the time when they were delivered to the
plaintiff. The Supreme Court agreed with the claim so far
as it related to the 7000 shares, but as to the deposited shares
they took the view that the plaintiff had made his claim in
respect of them for secret profits ; that he had affirmed the

transaction by taking and keeping the shares delivered to him when the account was closed ; and that as he had claimed in contract or quasi-contract against the company he could not claim against the directors unless he had shown against them some perception of the profits ; and that this he had failed to establish. They therefore reduced the amount of the judgment to the amount charged to the plaintiff for the 7000 shares less their value when delivered.

Regarded from this point of view their Lordships have no criticism to pass on the judgment. But the plaintiff before the Board put his claim on a broader basis, which is sufficiently revealed by the pleadings, and which their Lordships are disposed to accept. The company were employed as agents. If they had honestly fulfilled their mandate, they would have been entitled not to the price of the 7000 shares but to an indemnity against the price which they had paid to the sellers. But agents who engage in a fraudulent scheme to defraud their principal forfeit their right to an indemnity in respect of transactions which form part of the fraud. The company, therefore, were never entitled to an indemnity, and the principal on discovering the fraud was entitled to recover back the money paid on the footing of an honest transaction, giving credit, of course, for any benefit which he received, in this case the value of the 7000 shares at the time he received them. As to the deposited shares, in the circumstances of the case the company never had any right to deal with them. If the transaction had been originally honest, the company would only have had a special property which, on the facts of the case, even had the transaction been honest throughout, would not have given them the right to dispose of the shares, for there never had been default. But on the actual facts of a mandate accepted for the express purpose of being fraudulently misused by the agent, the agents never had the right to claim or to hold security, still less to dispose of it. Their disposal of the deposited shares amounted to nothing short of conversion, and the client on each occasion on which the shares were sold had vested in him a right to damages for conversion which would be measured by the

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J. C. value of the shares at the date of the conversion. How,
 1937 then, is his position affected by the fact that, not knowing
 SOLLOWAY of the conversion, he received from the wrongdoer, and has
 v. retained, the very goods converted or their equivalent? It
 McLAUGH- appears to their Lordships that the only effect is that he
 LIN. must give credit for the value of what he has received at the
 time he received it, and that the damages are reduced by
 this amount. In *Edmondson v. Nuttall* (1) the plaintiff had
 placed his looms with the defendant who was to supply
 standing room and power in his mill. The plaintiff demanded
 the return of his looms, the defendant refused (thereby being
 guilty of conversion), and the next day the goods were seized
 and subsequently sold under an execution from the county
 court on a judgment obtained by the defendant against the
 plaintiff. The question was whether the fact that the liability
 of the plaintiff on this judgment had been apparently satisfied
 by the seizure and sale of the looms could be taken into
 account in estimating damages for the conversion. The Court
 of Common Pleas, Vaughan Williams, Willes and Byles JJ.,
 decided against the defendant. "The measure of damages
 "for the conversion of goods" said Willes J. (2), "is prima
 "facie their value Then, there is the case in which
 "the goods wrongfully seized have been afterwards returned.
 "The cases of *Fouldes v. Willoughby* (3) and *Harvey v.*
 "*Pocock* (4), afford a familiar illustration of the rule. The
 "circumstances I have referred to have from very early
 "times been considered admissible in mitigation of damages,
 "because the plaintiff has had part satisfaction for the wrong.
 "If the goods have been restored, and the plaintiff has
 "consented to take them back in discharge of the claim,
 "that might perhaps be pleaded by way of accord and satis-
 "faction: if not, it would go in reduction of the amount
 "of damages to which the plaintiff would be entitled for the
 "wrongful conversion."

It does not require argument to show that the amount
 by which the damages are reduced must be the value of the

(1) (1864) 17 C. B. (N. S.) 280.

(2) *Ibid.* 294.

(3) (1841) 8 M. & W. 540.

(4) (1843) 11 M. & W. 740.

goods when returned. In the result, therefore, the plaintiff appears to be entitled to retain the sum for which he recovered judgment under the order of Kerwin J. It is objected that this will be to put him in a better position than if he had not been defrauded at all, and this appears to have influenced the decision of the majority of the Court of Appeal in Ontario. All that this amounts to is to recognize that fraudulent brokers have often sounder judgment than their clients as to the future course of markets. If the shares had been converted and not returned, there can be no question that the client would have been entitled to receive the proceeds of the conversion though he himself had planned to hold and thought he had succeeded in holding the shares until a time when the value was nothing. Fortunately for the commercial community the law has many effective forms of relief against dishonest agents, and no injustice is done if the principal benefits, as he occasionally may, by the superior astuteness of an unjust steward in carrying out a fraud.

In the course of the case a point has been made that the Assistant Master under the acts and rules of procedure in Ontario had no jurisdiction to entertain this case. It has not met favour in any of the Courts below. In the Supreme Court, though it is mentioned in the factums, it was either not argued or met with little approval, for it is not mentioned in the judgment. Their Lordships see no reason for interfering with the judgment on this ground.

The appeal will be dismissed and the cross-appeal allowed ; the judgment of Kerwin J., dated June 13, 1933, should be restored ; and the respondent should have the costs of the appeal to the Court of Appeal in Ontario and to the Supreme Court. The appellants must pay the costs of the appeal and cross-appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Gard, Lyell & Co.*

Solicitors for respondent : *Lawrence Jones & Co.*

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[PRIVY COUNCIL.]

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ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Cyprus—Bank—Employee—Basic salary in Turkish pounds—No “gold clause”—Payment in legal tender—Pension—Not payable in Turkish gold pounds or equivalent in Cyprus currency—Turkish law.

The respondent, who became an employee of the appellant bank in 1910, had no written contract of employment, but had signed a declaration to the effect that he would adhere strictly to the regulations governing the pension and superannuation fund adopted by the bank as forming an integral part of the conditions of his engagement. The contract of employment was governed by Turkish law, and his salary was in Turkish pounds, which, at the date of the contract, were paid in gold coins, though later, as the result of currency changes effected by statute consequent upon the war, he was paid in paper currency notes, which were then legal tender. He served in Turkey for many years, and in 1923 was transferred to Cyprus, where he remained in the service of the appellants until 1931, when he retired on the terms that he was entitled to a pension in accordance with the pension regulations at the rate of 48 per cent. of the fixed salary received by him on December 31, 1930. On a claim by him that there was an original contractual obligation, which still subsisted, to pay him his salary in gold, and that he was therefore entitled to be paid his pension in Turkish gold pounds, by which was meant the current value of the bullion content of the Turkish gold coin (or its equivalent in the currency of Cyprus) at the appropriate rates of exchange prevailing on the date of payment of each monthly instalment of the pension :—

Held, that the respondent's contention amounted to construing the contract exactly as if there were a gold clause expressed in it, whereas no contractual conditions which could be described as “a gold clause” were anywhere expressly to be found in the transactions between the parties.

The principle that a contract to pay so many pounds is not a contract to pay in gold, but is *prima facie* a contract to pay money according to the currency of the country where payment has to be made, was equally applicable to the present case, where there had been a change in the currency of the country concerned—

* *Present* : LORD THANKERTON, LORD WRIGHT, and SIR GEORGE RANKIN.

Turkey, and the original contract to pay the respondent in Turkish pounds was not, therefore, either on the above-mentioned principle or according to Turkish law, a contract to pay him in gold coins, even though gold was the then normal form of legal tender, but was a contract to pay him in whatever might be legal tender in Turkey at the material time. He was accordingly not entitled to be paid his pension in Turkish gold pounds or their equivalent in Cyprus currency.

Principles in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* [1934] A. C. 122, applied.

Held, further, that the practice of the appellant bank in paying their employees, and in particular the course which they adopted in Turkey after Turkish currency went off gold, could not be treated as showing that the original contract with the respondent was one to pay in gold coins.

Ottoman Bank of Nicosia v. Dascalopoulos [1934] A. C. 354, dissented from.

Judgment of the Supreme Court of Cyprus set aside.

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APPEAL (No. 56 of 1936) from a judgment of the Supreme Court of Cyprus (April 9, 1936), whereby an appeal by the present appellants, the Ottoman Bank of Nicosia, against a judgment of the District Court of Nicosia-Kyrenia (June 21, 1935) in favour of the respondent, Ohanes Chakarian, formerly employed by the appellant bank, was dismissed, the Supreme Court being equally divided.

The respondent entered the service of the appellants in October, 1910, as a probationer at Nazli, in Turkey, and was placed on the permanent staff in October, 1912. There was no written contract of employment, but he signed a declaration that he had taken knowledge of the regulations governing the pensions and superannuation fund adopted by the Direction Generale of the bank, and would adhere strictly to those regulations as forming an integral part of the conditions of his employment. He served in different parts of Turkey, except for war absence, until about October, 1922, and his salary was in Turkish pounds. Towards the end of April, 1923, he was transferred to Cyprus, where he remained in the appellant's service until 1931, when he retired on the terms that he was entitled to a pension in accordance with the pensions regulations at the rate of 48 per cent. of the fixed salary received by him on December 31, 1930. His basic salary as expressed in Turkish money was Ltq.30 a month,

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and his pension was therefore Ltq.14.40 a month. In his action the respondent claimed a declaration that he was entitled to be paid his pension in Turkish gold pounds, by which was meant the current value of the bullion content of the Turkish gold coin, or its equivalent in the currency of Cyprus, at the appropriate rates of exchange existing on the dates when the monthly instalments were paid to him.

The facts, the relevant articles of the pension regulations, and the practice adopted by the appellant bank in paying their employees after Turkey went off gold, appear from the judgment of the Judicial Committee.

The District Court of Nicosia-Kyrenia (Raif and Stavrinides D.JJ., Abbott P.D.C. dissenting) decided in favour of the respondent.

The Supreme Court of Cyprus (Stronge C.J. and Thomas J.) were divided, so that the decision of the majority of the District Court was affirmed.

The Ottoman Bank of Nicosia now appealed.

1937. Oct. 18, 19, 21 and 22. *D. N. Pritt K.C., Cyril Radcliffe K.C., Colin H. Pearson and I. W. G. Barry* for the appellant bank. There was no reference to gold in the pension regulations or in any other contractual document, and under his original contract or any modification or variation thereof the respondent did not acquire any right to receive payment of his salary or pension in specific gold coins or otherwise in gold, or upon any gold basis. At all times his salary under his contract was expressed in money and payable in currency, and not in gold or in terms of gold. The law of Turkey is the proper law of the contract, and according to the evidence by Turkish law the Turkish pounds referred to in the pension regulations and in the description of the respondent's fixed salary and pension are Turkish units of account payable in any form of currency which may be authorized as legal tender by the law of Turkey from time to time. From about April, 1915, onwards the appellants were entitled to pay, and from May, 1916, to December, 1919, did pay the salaries of the respondent and their other employees in Turkey in Turkish

currency notes as legal tender. From May, 1923, to the date of the respondent's retirement the appellants paid, and he accepted, his salary always in Cyprus currency at the fixed rate of Ltq. 110 to 100l. without regard to the varying relations of Turkish currency and Cyprus currency to each other and to gold in any form. [Reference was made to *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (1) ; *Auckland Corporation v. Alliance Assurance Co.* (2) ; *Payne v. Deputy Federal Commissioner of Taxation* (3) ; *Ottoman Bank of Nicosia v. Dascalopoulos* (4) ; and *The Ottoman Bank v. Chakarian.* (5)]

[LORD WRIGHT. If we have to compare *Dascalopoulos's* case (4) with the present one we shall have to know exactly what the difference is between the evidence before the Board in that case and in this.]

The evidence which had been given as to the relevant Turkish law was then read.

Radcliffe K.C. followed. The essential question, and the one which really decides this appeal, is : Is it right to say that when, in a country which is at the time on the gold standard, a contract is made for payment in the future of so many pounds—the unit of account—there is to be implied in that contract a stipulation that, should the country be off gold before the time of payment falls due, the creditor can claim his payment only in the currency which was ruling at the time the country was on the gold standard, or, alternatively, an increased amount in the currency then ruling to make up for its depreciation from gold ? [Reference was made to *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade, Ltd.* (6)] *Chesterman's Trusts, In re. Mott v. Browning* (7) is a decision that the true construction of a contract made without express provisions at a time when the country is on gold does not involve a contract to pay in gold coins, but a contract to pay in the currency which is the proper currency when the loan falls due. That view is supported by the

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(1) [1934] A. C. 122.

(2) [1937] A. C. 587.

(3) [1936] A. C. 497.

(4) [1934] A. C. 354.

(5) [1930] A. C. 277.

(6) [1921] 2 A. C. 438.

(7) [1923] 2 Ch. 466.

J. C. judgments in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (1) ; *Broken Hill Proprietary Co. v. Latham* (2) ;
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 It has now been established beyond cavil by the highest authorities that a contract for the payment of money without any further qualification or stipulation must be interpreted to be one for the payment of money when it falls due in whatever is legal tender for the money according to the law of the place where the payment has to be made. It is impossible in this case for any Court rightly to come to the conclusion that the original contract between the respondent and the appellants was one for payment in gold. If *Ottoman Bank of Nicosia v. Dascalopoulos* (4) is binding on the appellants, the Board will have to consider whether it is not inconsistent with other cases. In *Dascalopoulos's* case (4) there was no evidence about the Turkish currency law—there is an enormous gap. The judgments in *The Ottoman Bank v. Chakarian* (5) were before the Court in *Dascalopoulos's* case (4) and were distinguished. There are distinctions which make the decision in the *Dascalopoulos* case (4) inapplicable to the present one. The appellant bank in this case have been at great pains to see that very full evidence of all relevant matters has been put before the Board.

Sir William Jowitt K.C. and *Kenelm Preedy* for the respondent. The decision appealed from is correct. The case lies within a small compass. The question arises upon the terms of a contract, and the primary duty of the Board is to construe that contract. It is a Turkish contract on which Turkish law can operate, altering or modifying it even though in some respects it falls to be performed outside Turkey. It has not altered or modified it, it is submitted, and if that be so, then the contract must be examined to find out what it provides for. On December 31, 1930, the basis of the payment of the respondent's salary was Turkish gold pounds, and his pension is payable on that basis. He has to be paid on the

(1) [1934] A. C. 122.

(2) [1933] 1 Ch. 373.

(3) [1937] A. C. 587.

(4) [1934] A. C. 354.

(5) [1930] A. C. 277.

basis of the salary receivable in Cyprus on the material date, and that was a salary in Cyprus in Cyprus gold coins. He received in Cyprus at the material date a certain amount of Cyprus currency, it is immaterial whether it was gold or notes, because the one was the equivalent of or the same as the other at that date, Cyprus still being on gold. It is not true to say that he has merely received Cyprus currency; he has received Cyprus currency as being the equivalent of the Turkish money, which is the money of the salary, and therefore he has notionally received a certain quantity of Turkish money. What is that Turkish money or its equivalent in this Cyprus money? It can only be Turkish gold. Consequently, whatever his rights may have been, he has in fact received, or must be treated as though he had received, the appropriate number of golden mejidies.

Next, upon the evidence the Turkish paper notes were lawful tender only in Turkey itself. If under a Turkish contract a Turkish subject has to tender Turkish pounds outside Turkey, he can only do so by means of golden pounds. This being a Turkish contract to be governed by Turkish law, what was the nature of the commodity which ought to have been handed over by the bank to the respondent in Cyprus? It was a Turkish pound in Cyprus; and the Turkish Legislature has been careful to say that a piece of paper shall be a Turkish pound in Turkey, but they have never said that that piece of paper shall be a Turkish pound without that qualification, and paper was not available for the lawful discharge of a debt outside Turkey. The real question is: What is the commodity deliverable in Cyprus? There is no authority on that. [Reference was made to *Manners v. Pearson & Son* (1); s.s. *Celia v. s.s. Volturmo* (2); *Jacobs, Marcus & Co. v. Crédit Lyonnais* (3); *British Bank for Foreign Trade, Ltd. v. Russian Commercial and Industrial Bank* (4); *Anderson v. Equitable Assurance Society of the United States* (5); *Buerger and Another v. New York Life Assurance Co.* (6); and *Perry v. Equitable Life*

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(1) [1898] 1 Ch. 581.

(2) [1921] 2 A. C. 544, 550.

(3) (1884) 12 Q. B. D. 589.

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(4) (1921) 38 Times L. R. 65.

(5) (1926) 134 L. T. Rep. 557.

(6) (1927) 96 L. J. (K. B.) 930.

J. C. *Assurance Society of the United States of America.* (1)] In all those cases there appears to be no reference to a territorial limitation. There does not seem to have been any case in which the English Courts have ever had to deal with a problem where there has been a territorial limitation to the acceptance and dealing with paper. Turkish law has never said that Turkish notes are to be the equivalent of Turkish pounds in Cyprus, and this being a Turkish contract to be governed by Turkish law, the respondent is entitled to his pension in Turkish gold pounds.

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Lastly, *Ottoman Bank of Nicosia v. Dascalopoulos* (2) is a precise authority in the respondent's favour : there are no facts which can differentiate the present case from that. [Reference was made to the argument of Sir William Jowitt K.C. in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (3)] *Ottoman Bank v. Chakarian* (4) is not an authority in the present case because that case was dealing with payments made or to be made in Turkey.

Pritt K.C. replied.

Nov. 16. The judgment of their Lordships was delivered by LORD WRIGHT. The question in this appeal is the amount of pension to which the respondent is entitled on his retirement from the service of the appellants. His claim is that he is entitled to be paid his pension in Turkish gold pounds, by which is meant the current value of the bullion content of the Turkish gold coin (or its equivalent in the currency of Cyprus) at the appropriate rates of exchange. He succeeded in the Courts below, though there were considerable differences of judicial opinion. In the first Court, which was the District Court, two judges were in his favour, while the third dissented. In the Supreme Court of Cyprus there was again a division of opinion. Stronge C.J. delivered a judgment in favour of the appellants, while Thomas J. was of the opposite opinion. The Court being equally divided the judgment of the lower Court stood.

(1) (1929) 45 Times L. R. 468.

(2) [1934] A. C. 354.

(3) [1934] A. C. 122.

(4) [1930] A. C. 277.

The appellants, now called the Ottoman Bank, previously called the Imperial Ottoman Bank, were established in 1863 by a Turkish Imperial Firman. The head office is at Istanbul, where its affairs are, and have been, administered by a Direction Generale subject to instructions given by a committee which meets both in London and Paris. The appellants have a great many branches. These were before the war mainly in various places in the Ottoman Empire. Many of these branches are now, since the war, in countries which no longer form part of that Empire. But it also had branches before the war in Greece, Cyprus, Syria and other countries. The respondent entered the service of the appellants in October, 1910, as a probationer at Nazli, in Turkey, and was placed on the permanent staff in October, 1912. There was no written contract of employment, but he signed a declaration that he had taken knowledge of the regulations governing the pension and superannuation fund adopted by the Direction Generale, and that he would adhere strictly to those regulations as forming an integral part of the conditions of his engagement. It is clear, and is common ground, that the contract of employment was governed by Turkish law, and that his salary (what is described as his basic salary or his *traitement fixe*) was in Turkish pounds. He served in different parts of Turkey continuously (except for certain periods in 1916, 1917 and 1918 when he was absent on military service) until about October, 1922. He was then, for reasons connected with the war, compelled to leave Smyrna and go to Athens. About the end of April, 1923, he was transferred from Athens to Cyprus, where he remained in the appellants' service until 1931, when he retired on the terms that he was entitled to a pension in accordance with the pension regulations at the rate of 48 per cent. of the fixed salary received by him on December 31, 1930. His basic salary as expressed in Turkish money was Ltq.30 a month, and his pension was accordingly Ltq.14.40 per month. The question in the appeal is how that monthly pension is payable. As already stated, the respondent's contention is that he is entitled to be paid a fluctuating sum of money in currency sufficient to purchase the quantity

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of gold bullion which would have been represented by these Turkish pounds on a gold basis.

The pension regulations provide for the right of the employees to a pension on retirement subject to various conditions not here material, and the appellants bind themselves to maintain a pension fund to be fed from time to time by contributions from the employees of 4 per cent. of their fixed salary, together with half of any increments they receive in any year, and by monthly contributions from the appellants of 6 per cent. of the salaries. In 1925, during the course of the respondent's service, the 4 per cent. was increased to 5 per cent., and the appellants' contribution was increased to 10 per cent. The articles of the regulations which are essentially material in this case are the following :—

Article 14, which provides that "the amount of the pension is fixed on the basis of the salary which the employee received on the 31st of December of the year preceding that in which he is retired."

"Article 15.—The amount of the pension will be calculated on the following basis :—

"(1.) For 10 full years' service 30 per cent. of the annual fixed salary.

"(2.) 2 per cent. for each of the subsequent years."

"Article 16.—In no case shall the amount of the pension exceed the three-quarters of the annual fixed salary. Nevertheless, neither can the pension be less than Ltqs.45 per annum for an employee nor than Ltqs.25 per annum for a servant."

This last article shows that the basic salary on which the pension is based is to be expressed in Ltqs., and this is corroborated by art. 22, which deals with widows' and orphans' pensions, and which states that any such pension cannot be less than Ltq.25 per annum or more than Ltq.300 per annum.

It is not suggested that there are to be found anywhere any contractual conditions which could be described as "a gold clause." The respondent's claim is based on the fact that before the war the currency authorized as legal tender by the Turkish Government was on a gold basis and the

monetary unit was the gold pound, and that at the date of the contract the salary was paid to the respondent and other employees by means of that currency in gold coins, save as to fractional amounts. Assuming these facts, the conclusion is sought to be deduced that after the war, and after Turkey, like other countries, went off gold, still there was an original contractual obligation to pay in gold which existed throughout. In other words, this contention amounts to introducing into the contract the effect of a gold clause, a clause the nature of which has been discussed in several cases, though in fact no such clause is anywhere expressly to be found in the transactions between the parties. The respondent also sought to corroborate this conclusion by referring to the practice adopted by the Bank in paying the salaries of its employees in Turkey, in Cyprus and in other countries after the currency changes which were consequent on the war had taken place. The respondent contended that what was done in that way showed an intention throughout to pay the equivalent of gold coin. The appellants, on the contrary, relied on these same circumstances as showing that neither in fact nor in intention was the respondent ever paid on the basis of the gold content of the Turkish pound, or on a gold parity.

Before examining in outline the nature of the different evidence, it will be necessary to advert briefly to the evidence of the Turkish currency law. As has already been stated, before the war the Turkish currency was on a gold basis and the gold £1 coins were in circulation as legal tender. In January, 1915, the export of gold was prohibited, and a series of Acts were passed in Turkey providing for a paper currency which should have a compulsory circulation as legal tender alongside of, and as equivalent to, gold, that is to say, the currency note for the Turkish £1 should be legal tender compulsorily alongside of, and in place of, the Turkish monetary unit which, in a decree of 1880, had been specified to be the gold £ of 100 piastres. These various enactments, each of which provided for the issue of a certain quantity of paper currency notes, were expressed to be

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temporarily in operation and provided for the redemption of those paper notes in gold after the war. That has never been done. In 1925 the existing notes then in circulation were replaced by a single issue of notes by the Government. At all material times since the commencement of the war the paper notes have been legal tender and although the gold £ is still legal tender, the paper currency has, in accordance with Gresham's Law, driven out from circulation the gold currency, so that in practice gold has ceased to circulate as legal tender. The Turkish gold coins are now, for all practical purposes, only dealt with as a commodity or bullion. This was very fully explained by the evidence of the experts on Turkish law and on the conditions of Turkish currency called by the appellants. The appellants also called a Turkish lawyer who stated in evidence that by Turkish law a contract made, say, in 1912, subject to Turkish law, to employ a man at Ltq.20 a month, would not be construed by that law as a contract to pay him 20 pieces of gold even though gold was the normal form of the then legal tender, but as a contract to pay him Ltq.20 in whatever might be legal tender in Turkey according to Turkish law at the material time. There was, said this witness, nothing before the war in Turkish law to say that Ltq.4 salary was a contract meaning Ltq.4 gold. This evidence of the eminent Turkish lawyer was not shaken or contradicted, and no good ground can be adduced for not accepting it. It is, in fact, in accordance with the English law on this point, which is now well established, particularly by some recent decisions. In *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (1) a question arose as to the appropriate currency in which a certain debt should be discharged. The question there was not identical in form with the question here to be decided, but the House of Lords laid down certain principles which are of general application and are to be applied to the questions in this case. In particular, reference may be made to a statement by Lord Russell of Killowen, where he expresses the difference between what is called a unit of account and the

legal tender which corresponds to the unit of account. In the *Adelaide* case (1) the question was what was the currency in which the debt was payable, whether English or Australian. Lord Russell said (2): "The question then is, how can the Company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account." The same view was expressed by this Board in a similar case—*Auckland Corporation v. Alliance Assurance Co.* (3), where it is stated (4): "Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency." The unit of account must accordingly be applied to the appropriate currency, which may vary from time to time. In the *Adelaide* case (1) Lord Wright in his speech (5) quoted as a correct statement of the law what was said by Maugham J. in *Broken Hill Proprietary Co. v. Latham* (6): "A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is prima facie a contract to pay money according to the currency of the country where payment has to be made." These words are equally true of a case like the present, where the question does not turn on a conflict between the currency of one country and another, the unit of account being identical in both, but where there has been a change in the currency of the country concerned. That type of case was dealt with in *In re Chesterman's Trusts. Mott v. Browning* (7), where a mortgage debt in German reichsmarks contracted while Germany was on gold was held by Russell J. and by the Court of Appeal to be dischargeable in depreciated German reichsmarks without reference to what country was the place of payment. Lord Sterndale M.R. said (8): "If their [i.e., the mortgagees'] rights

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(1) [1934] A. C. 122.

(2) Ibid. 148.

(3) [1937] A. C. 587.

(4) Ibid. 605.

(5) [1934] A. C. 160.

(6) [1933] 1 Ch. 373, 391.

(7) [1923] 2 Ch. 466.

(8) Ibid. 478.

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"are to be defined by German law it must be that law as it "exists from time to time." The effect of the respondent's contention, if acceded to, would be to construe a contract which did not contain a gold clause exactly as if there were a gold clause expressed in it. The nature of a gold clause is now well established; it has been fully discussed in the decision of the House of Lords in *Feist v. Société Intercommunale Belge d'Électricité* (1), and more recently in *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft* (2), where it is pointed out by the Court of Appeal that gold clauses in bonds and obligations are very common in international contracts in every part of the world, and that the construction of such clauses has now been definitely settled. It would indeed be a paradoxical result if it were now to be held that the gold clause is unnecessary, because it is to be implied in every contract which was made at a time when the country was on gold and when payments were normally made on a gold basis. The gold clause was specifically designed to safeguard the rights of the creditor against the risk of the currency being changed and depreciated.

So far this way of regarding the matter would appear to be conclusive against the respondent's contention and to dispose of the appeal in favour of the appellants. It is necessary, however, to examine with some care the practice of the appellants in paying their employees, and in particular the course which they adopted in Turkey in paying the respondent and other employees after the Turkish currency went off gold. Reliance is placed by the respondent on these facts as being, in a phrase which was used, exegetical of the contract, and something like the principle of contemporaneous exposition was invoked. It is obvious that if a contract is clear and unambiguous its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that such conduct cannot have the effect of changing the operation of an unambiguous

(1) [1934] A. C. 161.

(2) [1937] A. C. 500.

agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification. But the practice which is relied on here is not contemporaneous with the contract, and at the best is ambiguous, whereas the contract is clear. In addition, the practice seems to be only consistent, when properly understood, with the construction of the contract which their Lordships have just enunciated. The change in the Turkish currency became effective early in 1915, but for some time did not appear to affect the actual relations of the parties in regard to the payment of salary while the respondent continued to serve in Turkey, which was until 1923, subject to his military service, and the short period which he spent at Athens. It will be convenient, first, to deal with what was done in Turkey in the payment of salaries to employees, including the respondent, in that country. Up to about May, 1916, the appellants, notwithstanding the change in the currency law, elected to pay the fixed salaries to their employees in Turkey in gold at its face value. From then, save for a few months in which half the salaries were paid in gold and the other half in currency notes, until December, 1919, they paid the fixed salaries in currency notes at their face value, but they made certain additional payments for practical reasons. By the latter part of 1916 the currency had seriously depreciated and the cost of living had enormously increased, and it was accordingly necessary for the appellants to take some remedial measures to help their employees in Turkey who, if paid in the depreciated currency the amount of their fixed salary and nothing more, would have been unable to live. The appellants were naturally anxious not to change the fixed salaries, because they thought that the unfortunate conditions would be temporary, and they sought to meet the conditions by paying in addition to the fixed salary certain additional emoluments which were variously called allowances, indemnities or gratifications. The fixed salary, however, was treated as constant, and the contributions to the pension fund continued to be based on the fixed salary. The amount of these additional allowances varied from time to time, and varied between one class of employee and another. They had

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no definite relation to the disproportion between gold and currency, nor had they the effect of paying to the employees sums in currency equivalent to what has been called the gold value of the fixed salary. It is unnecessary here to detail the elaborate calculations which the appellants adduced in order to prove this fact.

At the beginning of 1920 it was sought by the appellants to put the whole position on a more constant basis, and the scheme was adopted, at first only for one year, that the employees in Turkey should be paid on the following basis—the basic salary in the Turkish currency was multiplied by a co-efficient 110-100 and the product obtained, regarded as a notional sum in pounds sterling, was reconverted into Turkish currency at the average of the rates of exchange which had prevailed in the market during the previous three months between the pound sterling and Turkish currency; the sum in Turkish currency arrived at by these two arithmetical operations was with, in most cases, allowances, the sum paid to the employee. The rate of exchange for the previous three months was, in the first instance, taken as Ltq.3.63 to the £ sterling. This was an average rate and was further removed from accuracy by the time lag. That method was, after a few months, varied by substituting a conventional figure of 451 as a rate of exchange, and after a while the system became established to multiply the fixed salary by a fixed co-efficient of 4.1 as representing $4\frac{5}{11}$. This method was adopted with the same object of maintaining unaltered the fixed salary but increasing the payment in order to meet the increased expense of living, and it was sought to establish that position on a constant basis so long as circumstances might require. It is impossible to treat such a method as giving to the employees in fact or in intention the equivalent of gold. There are many reasons apart from the obvious purpose of the scheme as already stated. It is clear, in the first place, that at no period between 1920 and 1923 was sterling on a gold basis. For instance, in 1920, when the scheme was first introduced in its original form, England was off the gold standard and sterling had depreciated

in terms of gold to an extent of 20 per cent. to 25 per cent. ; sterling did not again go on to gold until late in 1925. Further, the rate which was adopted and which eventually became standardized at 451 piastres to the £ sterling, was much lower than the current market rates, which rose above 600 and eventually to a figure more than 800. Calculations have been adduced for the years 1921, 1922 and 1923 showing the disproportion between the actual salary payments made under this scheme as compared with what would have been the value in terms of fine gold of the fixed salary. Even if the additional allowances which were regularly made in addition to the payments on account of the fixed salary arrived at according to this system are taken into account, the total sums so paid to the employee are, in general, less, and sometimes much less, than what would have been the value of the gold content of the Turkish pound of fixed salary. It is enough here to state this conclusion without further discussing the detailed evidence.

The position so far is that no question of a change of practice arose until some years after the respondent's employment began, and because of the special conditions which supervened, and the practice which was adopted up to the time when the respondent went to Athens does not in fact support the view that he was being paid his salary according to its gold equivalent. During the few months in which he was in Athens he was paid in drachmas on a conventional rate of exchange. When he went to Cyprus it was on the terms of a letter from the general management, dated March 31, 1923, in which he was instructed to proceed to serve in Cyprus at the same salary of Ltq.30 per month "which will be paid to you on the basis of the system customary in that island (qui vous sera réglé en base du régime usité dans cette île)." The respondent proceeded accordingly. The "régime usité" thus referred to was a practice which had long been adopted by the appellants in paying their employees in Cyprus. The practice was analogous to that which they had adopted in paying employees in other countries, such as Greece or Egypt, in which there was a

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currency different from the Turkish. The amount of the fixed salary was converted into Cyprus currency at a fixed co-efficient 110 to 100. That practice, which prevailed before the war, was continued by the appellants after the war and notwithstanding the depreciation of the Turkish currency. It had the effect of making up to some extent the depreciation of the Turkish currency. It did not, however, put the payment of the Turkish salary when converted into Cyprus currency on a gold basis; in the first place sterling itself, as has already been pointed out, was not equivalent to gold; again, the conventional co-efficient 110 to 100 did not represent the true pre-war rate of exchange, which varied between 109 and 111½, nor did it represent the true ratio between the two gold coins, which was 110.69 to 100.

It is impossible, in their Lordships' judgment, to treat this method of paying salary as showing that the original contract was a contract to pay in gold coins. The ratio 110-100 had been adopted by the Bank for purposes of internal book-keeping, and had been adopted even before the war in paying its employees in Cyprus as a convenient and sufficiently accurate method, and as such was continued for the reasons which have been stated, but not with any intention or effect of paying on a gold basis. The respondent's contribution to the pension fund, which in Turkey had been paid on the converted figure of the fixed salary when that system was adopted, was in Cyprus paid on the actual salary payments in Cyprus currency, and was no more on a gold basis than the salary itself. The respondent further contended that while he was in Cyprus, and in particular on December 30, 1930, which was the date to be taken under the regulations for ascertaining his basic salary, what he was receiving was the equivalent of gold because, he said, in Cyprus, during the years he was there, the Cyprus currency notes, which were equivalent to the sterling currency, were in fact interchangeable with gold. Indeed, he said that occasionally he did actually get gold sovereigns from the Bank. Their Lordships find that there is no justification for this view; the evidence is quite clear that the sovereign in Cyprus, as in

England, was not used as currency. The records of the Bank show very few instances, negligible in amount, of sovereigns being paid or received. Hence this point may be disregarded. The precise effect of the letter of instructions coupled with the respondent's action taken on that letter has not been precisely elucidated in argument. It is not contested by the appellants that in respect of the Cyprus service they are bound to pay, and they are certainly willing to pay, the respondent in regard to his pension on the salary as based on the terms of that letter. It may be that there was in law a new and revised arrangement fixing the salary payable to him while in Cyprus on that particular basis. That, however, would not give the respondent any right to claim that his salary was on a gold basis. His rights would be to receive the fixed salary in Turkish currency converted by the artificial system which was adopted. This is what the appellants concede, but it would not, on any view, carry with it a right to be paid such an amount of Cyprus currency as would represent the gold value of Ltq.14.40. Nor would any different result follow if the true view were that this arrangement was simply giving effect to the original bargain between the parties which, on this view, included the implied term that the régime usité was to apply if the respondent was ordered to go to Cyprus. It would seem that so far as salary was concerned the régime usité only came into operation so long as the respondent was actually serving in Cyprus. It is not here necessary to determine what would happen as regards the pension if the respondent, while enjoying the pension, ceased to reside in Cyprus. At present he appears to have a permanent position there. It may be that the true view is that his pension, once having been ascertained in the way in which it has been ascertained, would remain unaltered even though he were to leave Cyprus.

Their Lordships have not thought it necessary to refer specifically to the entries in the salary book which seem to them to accord with the view of the position just stated. It is, however, necessary to refer to two further arguments which were put forward by Sir William Jowitt for the

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respondent. The first may be thus stated—"Taking the "salary at the material date on which the pension is to be "based at Ltq.30, and taking the conventional co-efficient of "110 to 100 and bearing in mind that Cyprus was on gold "parity at the material date, the true inference, it is contended, "is that the Bank thereby designed to pay in Turkish gold "because the ratio had no meaning as applied to Turkish "paper, in fact, at that time, the exchange of Turkish paper "as against sterling was 900 or more." This argument, in their Lordships' judgment, entirely overlooks the whole history of the case and the method of evaluation according to which the actual payments were arrived at. In addition it was, in the strict sense, merely accidental that the English £ was on gold in December, 1930. In the course of 1931, as is well known, the £ went off gold and the sterling £ depreciated so that the sovereign was worth more than 30s. sterling. This again shows that the co-efficient of conversion had no relation to gold.

A further point put forward by Sir William Jowitt was based upon the construction of the Turkish statute which authorized the issue of currency notes and made them legal tender. These statutes were in terms limited to Turkish currency in Turkey. Sir William has contended that outside Turkey pre-war currency law remained in effect, so that the legal tender outside Turkey remained the Turkish gold pound. Their Lordships are unable to accept this contention. The currency in any particular country must be determined by the law of that country, and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. There is no foundation in their Lordships' judgment for the argument that Turkish paper is only legal tender as equivalent to gold *sub modo*, that is, within the territorial limits of Turkish jurisdiction.

For these reasons their Lordships are of opinion that the appeal should be allowed.

It is, however, necessary to refer to two recent judgments of this Board which appear to conflict with each other, and one of which is, in the result, in conflict with the present decision. It will be convenient first to deal with the latter of these two cases, *Ottoman Bank of Nicosia v. Dascalopoulos*. (1) The Bank's employee, the plaintiff in that case, was serving in Cyprus when he became entitled to his pension in the latter part of 1932. It was held by this Board that he was entitled to succeed on his claim that the pension was payable in Turkish gold £ translated into Cyprus currency at the exchange rate of the day. The basis of their Lordships' decision was that the reference in the pension regulations to the Ltq. was a reference to Turkish gold £, on the ground, it seems, that the only Turkish gold £ in circulation was a gold coin of a special gold content. If this view of the true construction of the regulations could be regarded as a mere question of law, their Lordships might hesitate before differing from a previous decision of the Board, though in this particular case it has to be observed that the Board in that decision were, in truth, themselves differing from an earlier decision of the Board, as will be explained later. But the construction of the pension regulations depends on Turkish law which, in the Cyprus Court, is a question of fact, and the Board in *Dascalopoulos's* case (1) had no evidence before them on Turkish law. They did not have the evidence which the Courts had before them in this case and which their Lordships now have before them, that according to Turkish law the pension regulations did not constitute a contract to pay in gold. This vital circumstance is enough to entitle, and indeed compel, their Lordships now to consider the case before them independently of the *Dascalopoulos* decision. (1) There are several other matters which also impose this duty upon the Board, for instance, the evidence as to the Turkish currency law which has been given in the present case was not given in the previous case; the fact which the Board accepted as established before them,

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namely, that in Cyprus in 1930 the Cyprus £ note and the sovereign were in practice interchangeable, was negated by the evidence in the present case. There are also various other matters of fact and evidence not here necessary to enumerate in detail, which compel this Board to examine the question of construction afresh in the light of the circumstances proved before them and material to be considered in deciding what is the true construction of the contract, and also in understanding the practice adopted under the contract. These matters were not before the Board in the *Dascalopoulos* case. (1) It is thus not possible for the Board to hold, as was done in the *Dascalopoulos* case (1), that the equivalent in Cyprus currency as obtained by the formula of the régime usité was or was intended to be a real equivalent of gold, or that it was merely exegetical of a basic contract which was a gold contract.

It is necessary to consider one other case which recently came before this Board—*Ottoman Bank v. Chakarian*. (2) In that case Chakarian, who had been an employee of the defendant bank, sued in the Cyprus Court claiming that he was entitled to damages for wrongful dismissal from the bank's service. At the date of his dismissal he had been serving in Turkey. It was held by the Courts below, and by this Board, that his claim was justified, and that he was entitled to damages. The question arose as to the correct amount of damages to be awarded to him on the footing that he was serving in Turkey at the material date. His salary had been paid according to the system in vogue in Turkey, the nature of which has been explained above. The effect of that system was to give a monthly salary expressed in terms of Turkish currency arrived at by converting into Turkish currency the sterling figure into which the basic salary had been converted by the conventional co-efficient, presumably with due regard also to any extra allowances. The Board agreed with the majority of the judges of the Supreme Court that this was the basis on which the pension to which Chakarian would have been entitled was to be calculated. There was no suggestion

(1) [1934] A. C. 354.

(2) [1930] A. C. 277.

that the figures were to be taken as on a gold basis. The only point at issue was whether the rate of conversion of the figure of Turkish currency for the purpose of a decree in sterling was the rate current at the time of dismissal or that current at the date of the decree. The rate for the former date, which was accepted as a true date, was taken by agreement at 720 piastres to the pound. If this method was correct, as the Courts held that it was, it is evident that the matter was not dealt with as on the footing of a parity with gold. In the *Dascalopoulos* case (1), the Board did not, as their Lordships think, appreciate the effect of that decision, which the Board regarded as showing that the salary was assumed to be, even in Turkey, a salary in Turkish gold pounds. Their Lordships now have had the advantage of the elaborate evidence on the Turkish currency law and are unable to accept that view. They agree with the decision of 1930 (2) which is consistent with the decision they now arrive at in the present case, and is not consistent with the decision in the *Dascalopoulos* case. (1)

In coming to the conclusion that the appeal should be allowed the Board have had to consider what order should be made in their judgment on the question of costs. If the respondent were ordered to pay the costs, as would be done in the ordinary course, it would amount in effect to depriving him of his pension for the future and, indeed, in all probability to impose a much more serious liability. The appellants, however, through Mr. Pritt, have shown that they have appreciated what hardship to the respondent would be thus involved, and have stated that they are willing to leave the question of costs to the untrammelled discretion of this Board. Their Lordships feel that this case should be treated as one of very exceptional character, particularly because of the great conflict of judicial opinion, and of the importance of having a decision which may govern in future many other cases under the pension regulations. As the appellants have very fairly and generously left the matter to them, they feel justified in taking the view that no order should be made as to costs either here or below.

(1) [1934] A. C. 354.

(2) [1930] A. C. 277.

J. C. Their Lordships will therefore humbly advise His Majesty
 1937 that this appeal should be allowed, the judgments of both
 OTTOMAN Courts in Cyprus set aside, and the action dismissed.
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 CHAKARIAN. Solicitors for appellants: *Bischoff, Cox, Bischoff & Thompson.*
 Solicitors for respondent: *Gisborne & Co.*

J. C.* SFORZA APPELLANT ;
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 Nov. 16. AND
 OTTOMAN BANK OF NICOSIA RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

APPEAL (No. 7 of 1937), by special leave, from a judgment of the Supreme Court of Cyprus (Stronge C.J. and Thomas J.) (March 28, 1936) dismissing, the Supreme Court being divided, an appeal by the appellant, Francesco Sforza, against the judgment of the Divisional Court of Nicosia-Kyrenia (Fuad J.) (June 29, 1935) in favour of the respondents, the Ottoman Bank of Nicosia, by whom the appellant was formerly employed.

This appeal, subject to two matters of fact peculiar to it, raised in substance the same question as that decided in *Ottoman Bank of Nicosia v. Chakarian* (ante, p. 260).

The facts appear from the judgment of the Judicial Committee.

1937. Oct. 22, 25. *Sir William Jowitt K.C.* and *Kenelm Preedy* for the appellant.

D. N. Pritt K.C., *Cyril Radcliffe K.C.*, *Colin H. Pearson* and *I. W. G. Barry* for the respondent bank.

* *Present*: LORD THANKERTON, LORD WRIGHT, and SIR GEORGE RANKIN.

Nov. 16. The judgment of their Lordships was delivered by LORD WRIGHT. The appellant in this case was for about 28 years in the employment of the Imperial Ottoman Bank and of the respondents who, for all present purposes, may be regarded as identical with the Imperial Ottoman Bank. He entered into the Bank's service in June, 1903, at Constantinople. About three months later he was transferred to Cyprus, where he became a member of the permanent staff as from July 1, 1905, and signed a declaration, dated August 10, 1905, agreeing to be bound by the regulations governing the pension and superannuation fund of the Bank. In 1906 he was transferred to Smyrna, but in 1912 returned to Cyprus and there remained in the Bank's service (then the respondents) until he was discharged on December 1, 1933, with an admitted right to pension. The amount of that pension has been agreed to be Ltq.35, an amount arrived at on the footing of his basic salary as on December 31, 1932, which is the proper date for this purpose in accordance with the terms of the regulation. The question in this case is in substance the same as that which has been discussed and decided by their Lordships in *Ottoman Bank v. Chakarian* (Appeal No. 56 of 1936). In the present case the appellant failed before the trial judge, Fuad J. On appeal the judges of the Supreme Court of Cyprus were equally divided. In consequence the decision of Fuad J. stood, and the claim of the appellant was rejected. In view of what this Board has said in the judgment just referred to, it is unnecessary here to recapitulate in detail the terms of the pension regulations or the evidence as to Turkish law, or as to the Turkish or Cyprus currency. It was not contested here that the proper law was that of Turkey or that it was necessary to go to Turkish law not only to see what the contract was, but also to see what was meant by the Turkish £ in which it is admitted that the basic salary was payable. It is also necessary to refer to Turkish law to ascertain those statutory changes which were effected in the currency of Turkey at the material times. As all these matters are common to the present appeal with that of the *Chakarian* case (1) their Lordships do not think it

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necessary to repeat here the detailed investigation or the detailed conclusions which were there stated. Indeed, it was apparent at the hearing of this appeal that if the decision in the *Chakarian* case (1) was adverse to the respondent in that case and was in favour of the Bank, the same conclusion must follow a fortiori in the present appeal. The evidence as to the course of conduct in regard to the payments of salary from time to time was substantially the same in the present appeal as in the *Chakarian* appeal (1); there were, however, two circumstances peculiar to this appeal which are more in favour of the respondents and adverse to the appellant than what was found in the *Chakarian* case. (1)

The first of these matters is that at the material date for determining the basic salary for pension purposes, namely, December 31, 1932, England, and therefore Cyprus, the currency of which was on the same footing as that of England for material purposes, had gone off the gold standard, so that sterling had depreciated very substantially in terms of gold. At that date the sovereign was worth something like 30s. in sterling. While their Lordships do not think that this fact makes any difference as a matter of principle from what would have been the position if the material date for estimating pension had been a date while sterling, and therefore Cyprus currency, was still on gold, it does obviously make it much more difficult for the appellant to contend that he is entitled to claim to be paid on a gold parity. In their Lordships' judgment, the method of converting from Turkish £ into Cyprus currency according to the co-efficient of 110 to 100 was no more based upon the gold value of the Turkish £ than on the gold value of the English or Cyprus £ or sovereign. The rights and obligations of the parties depended at any given time on the value of what was the legal tender denominated by the unit of account. There was no gold clause either in respect of the Turkish £ or in respect of English or Cyprus currency. Throughout, the sole questions have been what is the unit, or what are the units, of account referred to in the contractual relationships between the parties,

(1) Ante, p. 260.

and what is the currency or what are the currencies, denominated by that unit or those units of account at any given moment, and what was severally the value or values at any given moment of that currency or of those currencies. That being so, if regard be had to the actual salary paid or payable at the date material for the determination of the amount of pension, there was no ground for saying either that the Turkish £ or the English or Cyprus £ was on a gold parity. The English or Cyprus unit of account was a factor equally divorced from a parity to gold value.

Thus the result is the same in substance in this case as in the previous appeal ; the appellant here has, in their Lordships' judgment, failed to make out his claim that he is entitled to receive from the respondents a pension payable on a gold basis or payable in Turkish gold £ or their equivalent in currency constituting legal tender calculated according to the rate of exchange prevailing on the dates when the monthly instalments fell due.

There was a further point relied on as against the appellant peculiar to this case. In this case, as in the *Chakarian* case (1), there was no evidence, or at least no evidence accepted by the Court, of any complaint as to the practice of the respondents in paying their employees' salary from time to time. The respondents, however, relied on a letter which the appellant wrote to the respondents on July 30, 1924. The respondents had proposed that he should be transferred from Cyprus, where he then was, to Mersina, in Turkey, with an increase in his basic salary. He protested against this proposal for the reason which he urged, and which he supported by precise figures, that though his basic salary if he went to Mersina would be increased, yet it would be of less value in fact to him because the basic salary if he went to Mersina would be paid in accordance with the Turkish régime, which has been explained in the previous judgment, and which involved a conversion of the Turkish basic salary into sterling and then back into Turkish currency at a fixed rate. He contended that this method would have the effect of giving him less

(1) *Ante*, p. 260.

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value than he was receiving in Cyprus according to the Cyprus régime. The importance of the letter, if it is important at all, is that he fully accepts the mode in which his salary was being paid to him in Cyprus, and clearly understands the method which the respondents were following in Turkey for paying their employees, and makes no claim that either method was wrong, or that he was entitled to be paid on a gold basis. Neither the Turkish nor Cyprus currency was then on gold. Their Lordships, however, do not think that that letter constituted an estoppel.

In the Supreme Court the Chief Justice was disposed to rely on that letter as a compromise within the meaning of art. 79, art. 1536, art. 1561 and art. 1562 of the Megelle, which at the date of the contract was still law in Cyprus. Their Lordships do not think it necessary to deal specifically with that matter because there are abundant reasons in their judgment why, apart from any conclusions based upon the Megelle, the construction and application of which are obscure, the appellant's claim, in their judgment, ought to fail. They think, therefore, that the appeal should be dismissed, but in this appeal, as in that appeal which their Lordships have just dealt with (1), they do not make any order as to costs. For reasons stated in the preceding appeal, the respondents have left the question of costs to the untrammelled discretion of the Board, and owing to the somewhat exceptional circumstances of the case and the grave conflict of judicial opinion which has arisen, they will, as in the other appeal, humbly advise His Majesty that this appeal should be dismissed without any order being made as to costs.

Solicitors for appellant : *Gisborne & Co.*

Solicitors for respondents : *Bischoff, Cox, Bischoff & Thompson.*

(1) Ante, p. 260.

[PRIVY COUNCIL.]

MERCANTILE BANK OF INDIA, LIMITED APPELLANTS ;
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Dec. 3.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

India—Bank—Loan to merchants—Secured by goods—Pledge of railway receipts—Receipts returned to merchants for specific purpose of clearing and storing goods in bank's warehouse—Further advance fraudulently obtained from second bank by pledge of same receipts—Claim for conversion by first against second bank—No duty owed—Estoppel.

A firm of merchants, who purchased ground-nuts from up-country growers and were entitled to obtain delivery of them under railway receipts, obtained a loan from the respondents, bankers, on the security of the goods covered by the railway receipts, and delivered the relevant receipts to the bank by way of pledge, giving to the bank at the same time a promissory note for the amount advanced and a letter of lien. The bank then passed the receipts on to their own godown keeper to enable him to obtain possession of the goods, and he, in accordance with the usual practice adopted by the bank, and in order to avail himself of the merchants' services, handed the railway receipts back to the merchants for the specific purpose of clearing the goods and storing them in the bank's godown. The merchants, however, then fraudulently used the same receipts to obtain a second advance from the appellants, bankers, from whom they had been in the habit of securing loans under arrangements similar to those negotiated with the respondent bank, and who were unaware of the loan by the respondent bank. On a claim by the respondents against the appellants for damages for conversion :—

Held, that the respondents owed no duty to the appellants in the matter—there was no relationship of contract or agency, and they had no reason to think that the receipts would ever be handed to the appellants—and they were not therefore estopped by their conduct in returning the receipts to the merchants for the specific purpose of clearing the goods from denying as against the appellants that the merchants had the right of pledging the goods as owners, or from setting up their title as against the appellants to the goods.

No authority had been given to the merchants to deal with the goods otherwise than by handling them for the limited purpose

* *Present* : LORD WRIGHT, SIR GEORGE LOWNDES, and SIR GEORGE RANKIN.

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of transferring them to the bank's godown. The respondents committed no breach of duty owing to the appellants or to any one else; all that they did was to deal with their own property, as pledgees, in the usual course of business which was well known to and had been followed both by the appellants and the respondents. Not only was there an absence of any duty or of anything amounting to a neglect of the usual precautions, but there was no ground for finding any representation by the respondents that the merchants had any title to dispose of the goods. The merchants could not transfer a better title than they possessed—a title subject to the pledge to the respondents.

Commonwealth Trust v. Akotey [1926] A. C. 72, not followed.

Official Assignee of Madras v. Mercantile Bank of India, Ltd. [1935] A. C. 53, referred to.

Decree of the High Court affirmed.

APPEAL (No. 54 of 1936) from a judgment and decree of the High Court of Madras in its appellate jurisdiction (January 24, 1935) affirming a judgment and decree of that Court in its original jurisdiction (August 9 and November 15, respectively).

The appellants and the respondents, the Mercantile Bank of India, Ltd., and the Central Bank of India, Ltd., respectively, carried on the business of bankers in Madras. C. K. Narayana Ayyar & Sons (the merchants) carried on business in Madras as buyers and exporters of ground-nuts, and were entitled to obtain delivery of the ground-nuts from up-country growers under railway receipts. Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts. The practice was that the merchants should deliver to the bank the relevant railway receipts by way of pledge, giving at the same time to the bank a promissory note for the amount advanced and a letter of lien. The bank would then pass the railway receipts on to their own godown keeper so as to enable him to obtain possession of the goods. What was in practice then done was for the bank's godown keeper, in order to avail himself of the merchants' services, to hand the railway receipts back to the merchants, but only for the specific purpose of clearing the goods and storing them in the bank's godown. The railway receipts concerned in this case were thirty-five in number. The merchants, in accordance

with the practice and for the purpose described above, after having received the advances, were given the railway receipts by the respondents, and then fraudulently obtained a second advance from the appellants. In due course the fraud became known and the merchants were declared insolvent. Thereupon the respondents brought an action for damages for conversion against the appellants. The appellants, in their amended defence, pleaded that: "The plaintiff bank having placed "C. K. N. & Sons in possession of the railway receipts without "anything therein to indicate that the plaintiff bank had "any interest therein or that C. K. N. & Sons were not the "owners thereof, enabled C. K. N. & Sons to hold themselves "out as the owners thereof and thereby to pledge the said "railway receipts for value with the defendant bank, who "acted in good faith, and the plaintiff bank is therefore "estopped from setting up its title against that of the defendant "bank to the relative goods or their value."

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The facts appear from the judgment of the Judicial Committee.

The trial judge (Stone J.) disposed of the plea of estoppel by observing that the only effect of such an estoppel would have been to shut out evidence of the Central Bank's title as pledgees, and since the Mercantile Bank had formally admitted that the Central Bank were bona fide pledgees for value of the railway receipts no evidence was required on that point and the estoppel therefore ceased to have any effect. He held, following the interpretation of s. 178 of the Indian Contract Act, 1872, in the decision in *Official Assignee of Madras v. Mercantile Bank of India* (1), that the respondents having obtained a valid pledge of the goods from the merchants by the pledge of the receipts, did not lose their rights as pledgees by what the merchants then did when they purported to pledge the goods with the appellants.

The High Court in its appellate jurisdiction (Beasley C.J. and Cornish J.), in separate concurring judgments, held that the question whether the Central Bank were estopped from setting up their prior title to the goods did arise, and they

(1) [1935] A. C. 53.

J. C. decided the question in favour of the Central Bank and
 1937 dismissed the appeal.

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1937. Oct. 28, 29. *A. T. Miller K.C.* and *C. P. Harvey* for the appellants. The railway receipts contained on their face a representation that C. K. N. & Sons were the owners of the goods covered thereby, and the respondent bank were, therefore, by their conduct in handing over the documents to C. K. N. & Sons without anything to indicate the pledge to them (the respondents) estopped from denying C. K. N. & Sons' right to the goods covered, and were estopped as against the appellant bank from setting up their title to the goods in question. The documents handed to C. K. N. & Sons, in the circumstances in Madras, conveyed the clear representation, to whomsoever they might be produced, that C. K. N. & Sons as owners had full and unfettered powers of disposition. The respondent bank intended C. K. N. & Sons to use the documents by reason of the representation they contained to get delivery of the goods. C. K. N. & Sons in producing the receipts to the appellant bank conveyed the respondents' representation, and the appellant bank acted upon it and advanced money on the strength of it. The respondent bank is thereby precluded from alleging that C. K. N. & Sons had no such disposing power and cannot set up their title. The primary matter in estoppel is not a question of duty, but of representation, of holding out. The whole of the circumstances must be taken into account, including the character of the person to whom the document is given—here it was a merchant. There was an act of negligence by the respondent bank, who must have known that C. K. N. & Sons could, having the documents, deal with them or the goods as their own. [Reference was made to the following authorities: *Official Assignee of Madras v. Mercantile Bank of India, Ltd.* (1); *Boyson v. Coles* (2); *Dyer v. Pearson* (3); *Cole v. North Western Bank* (4); *Pease v. Gloahec* (5); *Henderson & Co. v.*

(1) [1935] A. C. 53.

(4) (1875) L. R. 10 C. P. 354,

(2) (1817) 6 M. & S. 14.

364, 372.

(3) (1824) 3 B. & C. 38.

(5) (1866) L. R. 1 P. C. 219, 229.

Williams (1) ; *Johnson v. Credit Lyonnais Co.* (2) ; *Colonial Bank v. Cady and Williams* (3) ; *Fuller v. Glyn, Mills, Currie & Co.* (4) ; *London Joint Stock Bank v. Simmons* (5) ; *Commonwealth Trust v. Akotey* (6) ; *R. E. Jones, Ld. v. Waring & Gillow, Ld.* (7) ; *Farquharson Bros. & Co. v. King & Co.* (8) ; and *Sarat Chunder Dey v. Gopal Chunder Laha* (9) ; and to s. 115 of the Indian Evidence Act (I. of 1872).]

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C. P. Harvey followed.

Hon. Sir Stafford Cripps K.C. and *W. Wallach* for the respondents. The main purpose for which the respondent bank handed over the receipts to C. K. N. & Sons was to get delivery. There is no case of estoppel. Sects. 172 to 181 of the Indian Contract Act (IX. of 1872) deal with the whole matter of pledges. Sect. 178, as it then was, puts the duty on the second pawnee (the appellant bank) to satisfy itself that the pawnor had a good title. Assuming that estoppel does arise, what is complained of is that the railway receipts had nothing on them to show the respondent bank's title. It was admitted that it was the common practice to hand over the receipts to the merchants to get delivery, and therefore the case of arming some one with the indicia of title falls to the ground. The appellant bank's case is based on the failure of the respondent bank to put a rubber stamp on the receipts on receiving them from the merchants by way of pledge. The putting on of a rubber stamp would not prevent C. K. N. & Sons, if they so wished, from perpetrating a fraud on the appellant bank. Estoppel from failure to do something only arises where there is a duty to do something : this duty can arise from contract, by operation of law, or from acknowledged practice of trade. Here it is alleged that it was the duty of the respondent bank to place their stamp on the railway receipts. There was no evidence of the practice in trade to put a rubber stamp on the receipts : *Lloyds Bank, Ld. v. Bank of America National Trust and Savings Association.* (10)

(1) [1895] 1 Q. B. 521, 535.

(6) [1926] A. C. 72.

(2) (1877) 3 C. P. D. 32, 42.

(7) [1926] A. C. 670.

(3) (1890) 15 App. Cas. 267.

(8) [1902] A. C. 325.

(4) [1914] 2 K. B. 168.

(9) (1892) L. R. 19 I. A. 203.

(5) [1892] A. C. 201, 213.

(10) [1937] 2 K. B. 631.

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The rubber stamp has no effect : it shows that the document passed through the bank, but does not show for what purpose. Cases which deal with shares certificates and transfers are distinguishable from documents dealing with goods, or documents of title equivalent to goods. The second proviso to s. 178 of the Indian Contract Act, 1872, means that where goods or documents have been obtained from the lawful owner by a fraud or an offence, then the person who is in possession of the goods or documents of title cannot make a valid pledge of them. [Reference was made to *Reeves v. Capper* (1) ; *Farquharson Bros. & Co. v. King & Co.* (2) ; *London Joint Stock Bank v. Macmillan and Arthur* (3) ; *Johnson v. Credit Lyonnais Co.* (4) ; *Cole v. North Western Bank* (5) ; *Henderson & Co. v. Williams* (6) ; *Colonial Bank v. Cady and Williams* (7) ; *Fuller v. Glyn, Mills, Currie & Co.* (8) ; *Heap v. Motorists' Advisory Agency, Ltd.* (9) ; *Weiner v. Gill* (10) ; and *Fine Art Society v. Union Bank of London.* (11)]

A. T. Miller K.C. replied. Sect. 178 of the Indian Contract Act is irrelevant here : it neither helps nor injures the argument for the appellant. The Contract Act cannot preclude the plea of estoppel. It is said that the plea is based entirely on the omission to place a rubber stamp on the document. It is not an omission that is complained of, but the action in handing C. K. N. & Sons a document which they could use as their own. The authorities on duty do not apply.

1937. Dec. 3. The judgment of their Lordships was delivered by LORD WRIGHT. The appellants and the respondents are limited companies carrying on the business of bankers in Madras. The appeal is against the judgment of the Appellate Court of Madras, who have held the appellants liable to the respondents for the conversion of their property. The question

(1) (1838) 5 Bing. N. C. 136.

(2) [1902] A. C. 325.

(3) [1918] A. C. 777, 836.

(4) (1877) 3 C. P. D. 32.

(5) (1875) L. R. 10 C. P. 354.

(6) [1895] 1 Q. B. 521.

(7) (1890) 15 App. Cas. 267.

(8) [1914] 2 K. B. 168.

(9) [1923] 1 K. B. 577.

(10) [1905] 2 K. B. 172.

(11) (1886) 17 Q. B. D. 705.

arises out of a series of frauds committed by a firm of merchants named C. K. Narayana Ayyar & Sons, who will be referred to hereinafter as "the merchants." They were a firm who, until the frauds became disclosed, had enjoyed the highest standing and repute in Madras, where they carried on a large business as buyers and exporters of ground-nuts. Their practice was to purchase the ground-nuts from the up-country growers and have them despatched by rail to Madras. The railway companies and the Madras Port Trust, which had its own railway system within the Port, had a working arrangement between them under which the Trust took over the consignment of nuts on their arrival at the Port and lodged them in the first instance in their godowns. The ground-nuts were covered in respect of each consignment or wagon load by a document called a "railway receipt," which contained particulars of the goods and the names of the consignor and consignee. In all the consignments in question in these proceedings the merchants were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because, if they were not so named, the document had been endorsed by the named consignee. The railway receipts contained conditions to the effect that the railway receipt must be given up at destination by the consignee, failing which the railway might refuse to deliver, and that the signature of the consignee or his agent in the delivery book at destination should be evidence of complete delivery. They also provided that if the consignee did not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wished it to be made.

Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts. The practice was that the merchants should deliver to the bank the relevant railway receipts by way of pledge, giving at the same time to the bank a promissory note for the amount advanced and a letter of lien. The bank would then pass the railway receipts on to their own godown keeper so as to enable him to obtain

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possession of the goods. What was in practice then done was for the bank's godown keeper, in order to avail himself of the merchants' services, to hand the railway receipts back to the merchants, but only for the specific purpose of clearing the goods from the Port Trust and storing them in the bank's godown. The character and effect of this course of business was discussed by the Board in *Official Assignee of Madras v. Mercantile Bank of India*. (1) It was there held that the railway receipt was a document of title within the meaning of s. 178 of the Indian Contract Act, 1872, and that a pledge of the railway receipt operated under that section, which was in force at material times but has since been repealed, as a pledge of the goods, though by the general law a pledge of documents is not *prima facie* deemed to be a pledge of the goods. It was also held by the Board in that case that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts, or by entrusting them to the merchants or their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the bank's godown. It was said by the Board that such a procedure was in the usual course of business and was obviously either necessary or at least convenient for the conduct of the business.

The railway receipts concerned in this case were thirty-five in number. The merchants, in accordance with the practice and for the purpose described above, were given by the respondents the receipts and then fraudulently obtained a second advance from the appellants. It was found that in January and February, 1929, the merchants followed a systematic course of fraud in their dealings with both the appellants and the respondents. After having obtained railway receipts from either the appellants or the respondents, as the case might be, they repledged them with the other bank, that is to say, if the railway receipts had been pledged in the first instance with the appellants they took them to the respondents and obtained advances on them as if they had not been already pledged, and conversely, if they had been

first pledged with the respondents they took them to the appellants and obtained advances from them. There was, however, one difference between the two banks, in that the practice of the appellants was to place their stamp on the railway receipt when they took it by way of pledge. That practice was not adopted by the respondents until about the end of the period covered by the fraudulent operations. The addition of the stamp had no effect in law and was not, it seems, generally adopted by banks; but it would naturally, according to the evidence, put the other bank on inquiry. The merchants, however, were not unequal to dealing with this complication. They followed the simple process of obtaining delivery of the goods if the railway receipts bore the bank's stamp and thereupon pledging the goods themselves with the other bank. It was rightly not contested that such a pledge of the actual goods was invalid. In due course the frauds became known and the merchants were declared insolvent. Thereupon the respondents brought against the appellants an action for conversion out of which the present appeal arises. It was found by the trial judge, and is not now contested, that the respondents having obtained a valid pledge of the goods from the merchants by the pledge of the receipts, did not lose their rights as pledgees by what the merchants then did when they purported to pledge the goods with the appellants. This followed from s. 178 of the Indian Contract Act, 1872, as interpreted in the *Official Assignee of Madras* case. (1) This section, in force at material times, though since repealed, is in the following terms: "178. A "person who is in possession of any goods, or of any bill of "lading, dock-warrant, warehouse-keeper's certificate, whar- "finger's certificate, or warrant or order for delivery, or any "other document of title to goods, may make a valid pledge "of such goods, or documents; Provided that the pawnee "acts in good faith, and under circumstances which are not "such as to raise a reasonable presumption that the pawnor "is acting improperly: Provided also that such goods or "documents have not been obtained from their lawful owner,

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It has been found in the Courts below that the merchants obtained the documents or goods by means of an offence or fraud within the meaning of the section, because the true inference from the facts was that they obtained the documents with no intention of fulfilling their duty as mandatories but with the dishonest intention of perpetrating the frauds which they actually committed. The correctness of that ruling was not challenged before the Board. The appellants, however, claimed that they were entitled to succeed in the action on the ground which is set out in their amended defence in the following paragraph: "The plaintiff bank having placed "C. K. N. & Sons in possession of the railway receipts without "anything therein to indicate that the plaintiff bank had any "interest therein or that C. K. N. & Sons were not the owners "thereof, enabled C. K. N. & Sons to hold themselves out as "the owners thereof and thereby to pledge the said railway "receipts for value with the defendant bank, who acted in "good faith, and the plaintiff bank is therefore estopped "from setting up its title against that of the defendant bank "to the relative goods or their value."

It has been this plea which has been the subject of debate in the present appeal. Both Courts below have decided against it. It is admitted that the respondents made the advances completely bona fide; they only did what they had done for some time previously without any misadventure. They had regularly had dealings with the merchants over a prolonged period. The merchants were a firm of the highest standing and reputation, of whose rectitude and solvency there had been no question or suspicion. In delivering the railway receipts to the merchants the respondents followed a practice which had long been consistently followed both by the appellants and the respondents. No authority had been given to the merchants to deal with the goods otherwise than by handling them for the limited purpose which has been stated. On these facts it would *prima facie* seem impossible to say that the respondents made any representation to the

appellants that the merchants had authority, or were entitled, to obtain an advance on the goods for themselves. There would appear to be no reason for saying that the respondents committed any breach of any duty owing either to the appellants or to any one else. All that the respondents did was, it would seem, to deal with their own property, as pledgees, in the usual course of business which was well known to and had been followed both by the appellants and the respondents. It would seem, accordingly, that they were entitled to rely on the rule of law that no one could transfer a better title than he possessed, save in the exceptional cases not here material, such as sales in market overt, or where there has been a transfer of property avoidable on the ground of fraud but not yet avoided, or where the special provisions of the Factors Acts apply.

It has, however, been strenuously contended on behalf of the appellants that the circumstances here raise what is called an estoppel, and that the respondents are precluded by their conduct from denying as against the appellants that the merchants had the right, which they pretended to have, of pledging the goods as owners, the bona fides of the appellants not being in question. The estoppel is relied on as giving to the appellants the substantive right of claiming a valid pledge of the goods, taking priority over the pledge to the respondents, since though estoppel has been described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Of the many forms which estoppel may take, it is here only necessary to refer to that type of estoppel which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence, or by conduct, or by representation, or by a holding out of ostensible authority. The argument has been variously put on behalf of the appellants. They have claimed to succeed upon the broad rule stated by Ashhurst J. in *Lickbarrow v. Mason* (1) that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third

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(1) (1787) 2 T. R. 63, 70.

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“person to occasion the loss must sustain it.” The decision of the Board in *Commonwealth Trust v. Akotey* (1) was cited as one in which it was said that the case was a plain one for the application of that principle. The facts were that a grower of cocoa in the Gold Coast Colony had consigned cocoa by railway to a merchant at the port in the expectation of his buying the cocoa. The merchant, instead of concluding the purchase, purported to sell the cocoa as for himself to a third party, the appellants, who purchased in good faith and paid the full price to the merchant as seller. In an action for conversion brought by the grower, the full Court of the Gold Coast held that no property had passed because the merchant had no title. That judgment was reversed by this Board, who said that (2): “To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason* (3).”

What is there stated, it may be, would cover this case if it is applied without qualification. But, in their Lordships' judgment, it is impossible to accept without qualification as a true statement of law the principles there broadly laid down. It may well be that there were facts in that case not fully elucidated in the report which would justify the decision; but on the face of it their Lordships do not think that the case is one which it would be safe to follow. This was, it seems, the opinion of Lord Sumner, who, in a striking instance of a case where estoppel by conduct or representation was negatived, the case of *R. E. Jones, Ltd. v. Waring & Gillow, Ltd.* (4), said (5): “There was no duty between Jones, Ltd., and Waring & Gillow, Ltd., and, without that, the wide proposition of Ashhurst J. in *Lickbarrow v. Mason* (3) would not apply

(1) [1926] A. C. 72.

(2) Ibid. 76.

(3) 2 T. R. 63.

(4) [1926] A. C. 670.

(5) Ibid. 693.

"(see observations of Lord Macnaghten and Lord Lindley in *Farquharson Bros. & Co. v. King & Co.* (1) and of Lord Parmoor in *London Joint Stock Bank v. Macmillan* (2), "which were apparently overlooked in *Commonwealth Trust v. Akotey* (3))." Lord Sumner thus puts the principle of estoppel as depending upon a duty. The passage to which he refers in Lord Parmoor's speech in the *London Joint Stock Bank v. Macmillan and Arthur* (2) pointed out that the rule expressed by Ashhurst J. was too wide, and said that the accurate rule was stated by Blackburn J. in *Swan v. North British Australasian Co.* (4) There Blackburn J., referring to the judgment of Wilde B. in the Court below, said (5): "He omits to qualify "it [the rule he has stated] by saying that the neglect must "be in the transaction itself, and be the proximate cause of "the leading the party into that mistake; and also, as I "think, that it must be the neglect of some duty that is owing "to the person led into that belief, or, what comes to the "same thing, to the general public of whom the person is one, "and not merely neglect of what would be prudent in respect "to the party himself, or even of some duty owing to third "persons, with whom those seeking to set up the estoppel are "not privy."

To the same effect in *Farquharson Bros. & Co. v. King & Co.* (6) Lord Lindley said (7): "It is, of course, true that by "employing Capon [the fraudulent clerk] and trusting him as "they did the plaintiffs enabled him to transfer the timber to "any one; in other words, the plaintiffs in one sense enabled "him to cheat both themselves and others. In that sense, "every one who has a servant enables him to steal whatever "is within his reach."

Lord Lindley then pointed out that the dictum of Ashhurst J. is too wide. This has been pointed out by other judges. It was, indeed, not necessary to the decision of the case which was before Ashhurst J. The case of *Commonwealth Trust v. Akotey* (3) is also inconsistent with *Johnson v. Credit Lyonnais*

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(1) [1902] A. C. 325, 335, 342.

(5) Ibid. 182.

(2) [1918] A. C. 777, 836.

(6) [1902] A. C. 325.

(3) [1926] A. C. 72.

(7) Ibid. 342.

(4) (1863) 2 H. & C. 175.

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Co. (1), where it was held that the conduct of the plaintiff, in leaving the dock warrants, which were the indicia of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock company, did not disentitle the plaintiff from claiming for conversion against the defendants, who, in good faith, made advances to the fraudulent vendor on the security of the dock warrants thus left in his hands. In one sense the plaintiff, by leaving the indicia of title in the vendor's hands, had enabled him to defraud the defendants; but it was held by the Court of Appeal that, in the words of Cockburn C.J. (2): "The case for the plaintiff rests on the 'general proposition of law—which as a general proposition 'cannot be contested—that the mere possession of the property 'of another, without authority to deal with the thing in 'question otherwise than for the purpose of safe custody, 'as was the case here, will not, if the person so in possession 'takes upon himself to sell or pledge to a third party, divest 'the owner of his rights as against the third party, however 'innocent in the transaction the latter party may have been.'"

The Chief Justice adds that if it were held that in such a case there was an estoppel, the Factors Acts, which give a limited protection in certain cases to the unauthorized sale of goods, would have been unnecessary. In their Lordships' judgment, it cannot be said that the respondents owed any duty to the appellants in the matter. There was no relationship of contract or agency. They had no reason to think that the documents would ever be handed to the appellants. Mr. Miller's contention that estoppel does not depend on the existence of a duty is, in their Lordships' judgment, refuted by the authorities already cited and many other like authorities which it is not necessary to cite.

Mr. Miller, however, argued that the necessity of a duty to constitute an estoppel only applied to an estoppel based on conduct or negligence, whereas an estoppel based on representation was different. He contended that the mere form of the railway receipts contained a representation by the respondents to any

(1) (1877) 3 C. P. D. 32.

(2) *Ibid.* 36.

person to whom the merchants might produce them that the merchants had the power to obtain a pledge on the security of the goods. There was, he contended, in this way a representation of authority which bound the respondents because it enabled the merchants to mislead the appellants. No question of duty or negligence arose on this view of the position, so he submitted. The document on its face conveyed a representation when presented by the merchants to the respondents that the merchants were invested with full disposing power. No authority was cited which in their Lordships' judgment would justify any such wide proposition. It is not, indeed, true to say without qualification that people are not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. *London Joint Stock Bank v. Macmillan and Arthur* (1) is a case in which the bank's customer was held liable because he had facilitated the fraudulent alteration of a cheque by so drawing the cheque as to leave a space which the forger could fill up; and thus alter the amount of the cheque. But that decision was expressly based on the existence of a duty arising from the contract between banker and customer, and was distinguished on that ground from *Scholfield v. Earl of Londesborough* (2), where any duty was negatived. Even if there is a duty as between the banker and the customer in drawing a cheque, it must be shown that there was a breach of the duty by the neglect of some usual and proper precaution. It was by the absence of such proof that *Slingsby v. District Bank, Ltd.* (3), was distinguished from the *Macmillan* case. (1) [In the present case not only was there an absence both of any duty or of anything amounting to a neglect of usual precautions, but there was, in their Lordships' judgment, no ground for finding any representation. There was no reason for the respondents to think that they were representing to anybody that the merchants had any title to dispose of the goods.] The railway receipts were not dangerous things; there was no question of arming the merchants with them. It is only in special conditions of fact that an estoppel

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(1) [1918] A. C. 777.

(2) [1896] A. C. 514.

(3) [1932] 1 K. B. 544.

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by representation can be established. There are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded. Such a case was *Henderson & Co. v. Williams* (1), which was relied on by Mr. Miller. There was in that case an actual transfer of goods lying in a warehouse, to the order of Fletcher, a transfer made on the express instructions of the owner of the goods, who was induced to do so by Fletcher's fraud: Fletcher then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods to Fletcher's order. That was held to be a case where both the warehouseman and the owner were estopped from denying the rights of the purchaser. The warehouseman had in fact attorned to the purchaser, and it was also held that there had been a holding out by the true owner of the goods that Fletcher was capable of giving a good title. That was a very different case from the present.

A similar principle of holding out has been applied in the cases where a share certificate with a transfer in blank has been placed in the hands of a stockbroker, or one in a similar position, and where it has been held that there was a representation which constituted an estoppel. Such a case is illustrated by *Fuller v. Glyn, Mills, Currie & Co.* (2), where the plaintiff had left share certificates in the hands of stockbrokers; the certificates were in the name of a person from whom the plaintiffs had bought the shares and bore upon them an endorsed form of transfer executed by the seller. The stockbrokers used the certificates in order to obtain an advance for themselves. On their bankruptcy the plaintiff claimed the certificates from the pledgees, but it was held that he was estopped from setting up his title as against them. The instrument was held to carry with it a representation of authority in the person entrusted with it to deal with it, and if produced to a third person calculated to convey to that third person that such an authority existed. On the facts of such a case there was, in addition to the form of the document, the character of the person in whose hands it was. As was

(1) [1895] 1 Q. B. 521.

(2) [1914] 2 K. B. 168.

said in *London Joint Stock Bank v. Simmons* (1) by Lord Watson (2): "brokers, in the ordinary course of business, "are employed to sell, to buy, and to raise money upon as well "as to keep in custody the securities of their customers," and accordingly it was a reasonable assumption that the broker had full authority to deal with the securities. It is not necessary to discuss such cases further, or express any opinion about them, because the material circumstances were not present here. [The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods, and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was, at the best, an ambiguous document. Its possession no more conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument; the possession of the railway receipt is no more significant for this purpose than the possession of the goods would have been.] It is clear that no plea of estoppel could be raised in the cases where the merchants pledged the goods themselves after having obtained delivery under the railway receipt. It is not necessary to refer to cases where an agent entrusted with documents with a specific authority to deal with them for his principal, has fraudulently used them for his own purposes. Such cases are quite different.

Nor is there any basis for the contention that the respondents are liable because they omitted the precaution of putting their stamp upon the railway receipts in regard to the transactions in question. It is true that at a later date the respondents did stamp the railway receipt, and that the appellants in practice did so throughout; but it is clear, in their Lordships' judgment, that that would have made no difference to the course adopted by the merchants. If the stamp had the effect of putting the bank on inquiry, the merchants would not adopt the method of seeking to obtain a second advance on the documents, but would have taken

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(1) [1892] A. C. 201.

(2) *Ibid.* 213.

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delivery under the receipt of the actual goods and pledged them, or if they did seek to obtain a second advance on the documents and had been asked by the bank to explain why the railway receipt was stamped, might have said that they had pledged the documents and redeemed that pledge. Having regard to the position which they held, that explanation would, presumably, have been accepted. There is, however, a more general answer to any argument based upon the respondents' failure to stamp. It is not suggested that it was a usual practice, so that failure to adopt it could be charged against the respondents; but even if it were, it would still be of no avail to the appellants, because there was no duty as between the appellants and the respondents to adopt any such practice. As already pointed out, [the existence of a duty is essential, and this is peculiarly so in the case of an omission.] This is so even if the case were put on representation or holding out. The duty may be, in the words of Blackburn J. (1): "to the "general public of whom the person is one." There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority. In their Lordships' judgment the appellants fail to establish these conditions.

Sect. 115 of the Indian Evidence Act does not call for particular discussion here. It is conceded that the law it enacts is the same as the English law: see *Sarat Chunder Dey v. Gopal Chunder Laha*. (2)

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *E. F. Turner & Sons*.

Solicitors for respondents: *Hy. S. L. Polak & Co*.

(1) (1863) 2 H. & C. 175, 182.

(2) (1892) L. R. 19 I. A. 203, 215.

[HOUSE OF LORDS.]

H. L. (E.)*

HERNIMAN	APPELLANT ;	1937 Oct. 18, 19, 21, 28, 29 ; Nov. 1, 2, 4, 5, 8 ; Dec. 22.
AND		
SMITH	RESPONDENT.	

Malicious prosecution—Reasonable and probable cause—Functions of judge and jury.

Applied. TEMPEST
C. SNOWDEN
[1952] 1 K.B. 130

In an action for malicious prosecution, the function of the jury is to find what are the relevant facts, if these are in dispute. When the facts operating on the mind of the prosecutor are ascertained, it is for the judge to decide whether they afford reasonable and probable cause for prosecuting the accused person.

Definition of "reasonable and probable cause" by Hawkins J. in *Hicks v. Faulkner* (1878) 8 Q. B. D. 167, 171, as "an honest "belief in the guilt of the accused based upon a full conviction, "founded upon reasonable grounds, of the existence of a state "of circumstances, which, assuming them to be true, would "reasonably lead any ordinarily prudent and cautious man, "placed in the position of the accuser, to the conclusion that the "person charged was probably guilty of the crime imputed," approved, but his statement in the same case (p. 172), that the reasonableness of the accuser's belief in the existence of the facts on which he acted is a question of fact for the jury, dissented from.

It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution. Circumstances may exist in which it is right, before charging a man with misconduct, to ask him for an explanation ; but no general rule can be laid down, and where a person is satisfied, or has apparently sufficient evidence, that he has in fact been cheated, there is no obligation to call on the cheat and ask for an explanation, inasmuch as to ask for this may only have the effect of causing material evidence to disappear or be manufactured.

Bradshaw v. Waterlow & Sons, Ltd. [1915] 3 K. B. 527 approved. Decision of Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal.

The appellant, the plaintiff in the action, sued the respondent claiming damages for malicious prosecution. At the trial before Talbot J. and a jury a verdict was returned in favour

* *Present* : LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD MAUGHAM, and LORD ROCHE.

H. L. (E.) of the plaintiff and judgment was entered in his favour for 5000*l.* with costs. On appeal the Court of Appeal set aside the verdict, holding that there was no absence of reasonable and probable cause for the prosecution, and entered judgment for the present respondent.

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The circumstances out of which the proceedings arose and the course they took were stated by Lord Atkin as follows : The plaintiff, Herniman, carried on business in London as a timber merchant and at the time of the criminal proceedings was about sixty-two. He had served in the Royal Horse Artillery since 1894 ; at the date of the outbreak of the War he had been Battery Sergeant-Major, was granted a commission in December, 1914, and retired in November, 1919, with the rank of Captain. He went into the timber trade and after one or two successful ventures started his present business in 1930, and opened a small office in Chandos Street, Buckingham Gate, in 1933. His business began to prosper, and from about the last mentioned date one of his customers was the defendant Smith, who was a builder engaged at material times in developing building estates at Edmonton, Loughton, Eastcote and other places. There is no evidence that Smith knew anything about Herniman's career other than that he was Captain Herniman. The course of business between the parties is not made entirely clear by the evidence, but the general outlines are obvious enough. Herniman's office and staff were limited to one room and a clerk, Copland. Herniman went about and got orders. He would either get notice of available parcels offered to him by the large merchants, whom it will be convenient to call the importers, and pass on the details in an offer to his customers, or he would get an order from a customer and then buy from the importer to complete it. Sometimes, of course, he would have to go to more than one importer to get the requisite sizes, and it would happen that whether he bought and then sold or sold and then bought it would be convenient at times to buy parcels which did not correspond to any then existing order. The stock so acquired was never large, and Herniman in fact kept no stock book. When there was any spare stock of

which he took delivery he was able to store it in the yard of Rickard, his co-defendant in the criminal proceedings. He had no storage accommodation of his own. Rickard was a carrier; he owned about ten lorries and had his yard at Bermondsey. He appears to have carried for Herniman all the timber that was sold to Smith, and his terms were 1*l.* per standard. Most of the timber was sold per standard, which is a cubic measure, at about 14*l.* per standard. Some of the timber matchboarding was sold by the square, which is a superficial measure. Twenty squares for purposes of calculating freight equalled one standard. There is some uncertainty as to the practice of Herniman and Smith respectively concerning the recording of contracts. Smith had at one time an order book, but apparently none of the relevant orders were to be found recorded in it. They were given, so it was said, verbally by King, Smith's manager, to Herniman. Herniman kept no order book; he wrote down the orders as received in a notebook which was not kept after it had served its purpose. One is left with the conclusion, which is accurate enough generally, that the goods placed on a lorry would correspond with a specific order, generally in complete fulfilment of the order, or at any rate in part. When Herniman desired to fulfil an order he would receive a delivery order from his importer entitling him to receive from dock or warehouse the agreed quantity of timber. He would hand this to his carrier Rickard, with instructions to get delivery of the goods and carry them to Smith. He would also provide Rickard with blank delivery notes with printed headings bearing Herniman's name and addressed to Smith—"Please receive from (Herniman)." The delivery notes bore two printed notices: "Note.—This note must in no case be signed for more pieces than are actually received, or no claim can be allowed in case of deficiency." "Rejections not entertained unless made at time of delivery." It was the duty of the lorry driver to fill up the details from the document he received at the dock, the dock pass, specifying the timber loaded. The delivery note was prepared in duplicate: it would be signed by the checker in the employ

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H. L. (E.) of Smith on the building site : and one copy would be left with Smith's representative : the other retained by Rickard's lorry driver. The dock pass was prepared by the Dock Authorities : it would correspond with the delivery note : and served as receipt to the Dock Authorities, and a pass-out for the goods from the dock premises. When delivery was completed the dock pass and Herniman's delivery note signed by Smith's checker would be handed by the driver to Rickard, who pinned them together and sent them to Herniman's office. Herniman's clerk would prepare an invoice from the receipted delivery note : and in about ten days' time Herniman would draw on Smith a three months' bill for the invoice amount. Business was done between the parties on these lines in the years 1933, 1934 and 1935 to a considerable extent : the turnover in that period was to an amount of about 26,000*l*.

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The first intimation of any dishonesty received by Smith was contained in a letter addressed to him by one Edger, dated November 14, which stated that he had been in the employ of the Stirling Haulage Co. [Rickard], carters for Herniman, "and during my 16 months' service of timber carting to Edmonton, Loughton, Enfield and Eastcote "your delivery tickets have been faked to the extent of "34 standards." It went on to state that this was only one of four lorries doing the same : and that if Smith cared to see him he could furnish dates and quantities. Smith had an interview with Edger, who told him that shortly after starting to work for Rickard he was told by Rickard to put extra timber over and above that delivered to the customer on the bill. This would be done by increasing the foot run, calling 14 feet lengths 16 feet and so on in proportion : also by the number of pieces in the various lengths. He produced a list of total increases showing on certain dates extra amounts varying from $\frac{1}{2}$ to $2\frac{1}{4}$ standards in the day. The list gave no details. Smith put the matter in the hands of the police, who from this time on were engaged in investigating the alleged fraud.

The police obtained from the dock authorities copies of the dock passes : and when compared with Herniman's delivery

notes it became evident that in several cases at least Edger's statement that he had "faked" the delivery notes was true. An instance will suffice. On May 15, 1934, there is a delivery note from Herniman relating to 665 pieces T.G.V. and 905 pieces F.E. The corresponding figures in the dock pass of the same date are altered, as appears in the table below :—

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Dock Pass.		Delivery Note.	
4 ^t T.G.V. $\frac{1}{2} \times 4\frac{1}{2}$		$\frac{5}{8} \times 4\frac{1}{2}$ T.G.V.	
No. of pieces.	Length in feet.		
6	20	6	22
33}	19		
23}	18	56	21
31}	17		
77}	16	108	20
52}	15		
37}	14	89	19
58}	13		
48}	12	106	18
37	11	37	17

The brackets are inserted in order to call attention to the identity of the numbers. In relation to the same delivery note the 705 pieces F.E. in the dock pass have been altered in the delivery note thus :—

Dock Pass.		Delivery Note.	
Dimensions	$\frac{3}{4} \times \frac{1}{4} \times 4\frac{1}{2}$	$\frac{3}{4} \times \frac{1}{4} \times 5$	
14	20	18	22
4	19		
12	18		
36	17	48	21
13	16		
112	14	125	20

and so on and 705 pieces have become 905. Part of the consignment it is difficult to identify and it is probable that the order was completed from stock in Rickard's yard; the dock goods not required having been unloaded there. The figures as to dimensions appear in the delivery note in both cases to be in Rickard's handwriting; the rest of the document is in Edger's writing.

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The delivery note was signed by one of Smith's servants, but there was evidence that with large deliveries in the stress of business it was in practice impossible accurately to check the number and dimensions of the pieces, and that the checker often gave up the task and signed as a matter of form. The invoice corresponded with the delivery note: and therefore it is plain that payment was demanded by Herniman for the increased quantity and that it was received by him. The excess in this case is stated to be the equivalent of over 20 squares which at 10s. and 8s. a square, which was the price in this case, would amount to 8*l.* to 10*l.* The average price of the timber sold by the standard was about 14*l.* per standard.

After Smith's first interview with Edger before the police had obtained copies of the dock passes, Smith complained to Herniman about deliveries which had been made to a building site at Eastcote and there was some correspondence about it. Apparently Smith was under the impression that a large amount of timber, about 14 standards of 2 by 4, had not been delivered. It was in fact found to be on the site, where it had been overlooked. Evidence at the trial was given by Herniman that this appeared to satisfy Smith; and, as Smith gave no evidence at the trial, the jury were entitled to believe this. Smith, however, used the occasion to ask for the dock delivery tickets on which to check deliveries; and he was told that they were not kept after goods had been invoiced by reason of restricted office space. On December 21, when copies of the dock delivery tickets had been obtained by the police, Edger made a further statement confirming his former allegations and pointing out instances of how the alterations were made as in the instance I have just given. On January 20 another lorry driver, Dean, made a similar statement to Edger's to the effect that since September, 1933, Rickard had shown him how to make out delivery notes increasing size and length and number of pieces and told him to do what he could, and that during that period he had continued to fake the delivery notes. When called before the magistrates Dean deposed that the above statement was all wrong: and he was not in fact called at the Central Criminal Court. On

January 25 Smith swore an information against Herniman and Rickard that they had conspired together to cheat and defraud Smith in the supply and delivery of timber, and in pursuance of such conspiracy and by false pretences and with intent to cheat and defraud had obtained from him between May, 1934, and August 31, 1934, the sum of 34*l*. On this information, which was apparently drafted by the police, a Justice of the Peace issued a warrant for the arrest of Herniman and Rickard under which both men were arrested at their respective offices and asked to produce their books, of which the police took possession. In my opinion, an information in the general terms used in this case should not have been accepted by the justice as sufficient to justify a warrant ; and in any case it seems a remarkable exercise of discretion to authorize the arrest of men who had been carrying on a substantial business at ascertained addresses for a number of years and against whose character nothing was known. However, Smith could not be made responsible for the exercise of a judicial discretion. At the hearing before the justices evidence was given at various dates of four instances in which delivery notes had been faked : and of payment on the invoices based upon them. The prosecution was conducted by a solicitor on behalf of Smith. The two defendants, after submitting unsuccessfully to the justices that there was no case, reserved their defence and were committed for trial to the Central Criminal Court. They were tried before the present Recorder on an indictment which in the first count charged them with conspiracy to defraud Smith between April 1, 1932, and November 30, 1934, by false representation as to the quantities and description of timber supplied, and in four other counts charged them with obtaining a definite sum of money by falsely pretending that they had delivered more timber than was in fact delivered. The second count was based on the documents which I have already discussed. The defendants gave evidence and explained the difference between the dock passes and the delivery notes by stating that the dock passes only represented Herniman's purchases, and that to fulfil Smith's contracts the lorries would be taken

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H. L. (E.) to Rickard's yard and the contract quantities and lengths substituted where necessary in place of the dock quantities. They both repudiated Edger's story of having received instructions to fake the dock passes, and relied on admissions made by Edger that in some cases he had removed timber from the lorries and sold it ; and accounted for his alterations by asserting that they were part of his method to conceal his own thefts. Both defendants were convicted and were sentenced to twelve months' imprisonment. On appeal, as has been already stated, the convictions were quashed by the Court of Criminal Appeal. It should be stated that the plaintiff stated in evidence that in September, 1934, Smith had asked for a loan of 500*l.*, which had been refused. On November 24 Smith refused payment of a bill for 200*l.*, dated August 21, and drawn at three months. It will be noticed that this was ten days after the first letter from Edger, dated November 14. Thereafter he refused payment of all Herniman's bills and between December 6, 1934, and January 24, 1935, Herniman issued five specially endorsed writs against him for the amount of the bills, in all about 1325*l.* The affidavits in answer all alleged fraud : certainly some of them did not state the fraud as sought to be proved in the criminal proceedings. For instance, in one affidavit dated January 2, 1935, Smith swore that the plaintiff by his agent "represented that certain goods . . . would be delivered "upon the terms agreed and in consideration thereof the "defendants' firm gave the plaintiff the bill of exchange sued "on " : and it was suggested that this represented, contrary to the fact, that the bill was accepted before the goods were delivered. This was used as evidence that the plaintiff did not honestly believe the case upon which he founded the prosecution. In view of the fact that the police at this time were actively pursuing inquiries, following out Edger's story, the evidence said to be afforded by the affidavits seems of little value. There are several explanations of inaccuracy in such affidavits consistent with complete belief in the eventual story.

The plaintiff appealed to this House.

Comyns Carr K.C., S. Parnell Kerr and W. Russell Lawrence for the appellant. As was pointed out by Lord Finlay L.C. in *Banbury v. Bank of Montreal* (1), in a jury case the verdict was in early days final, subject only to the ancient writ of attaint against the jury. Even now, in order to get a new trial the party asking for it must establish that the verdict was such that no twelve reasonable men could have found it. We submit that the evidence was not such as to justify the setting aside of the verdict in the trial before Talbot J. In *Turner v. Ambler* (2) Lord Denman C.J. said that "the reasonable and probable cause" for instituting the prosecution "must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding." That condition was not satisfied in this case. The respondent should have made further inquiries, and not having done so it cannot be said that he took reasonable care to inform himself of the facts before instituting the prosecution. The appellant has satisfied the conditions laid down by Bowen L.J. in *Abrath v. North Eastern Ry. Co.* (3), namely, that he was innocent of the charge made against him, and that there was a want of reasonable and probable cause for the prosecution. [They also cited *Ravenga v. Mackintosh* (4); *Panton v. Williams* (5); *Ellis v. Abrahams* (6); *Walters v. W. H. Smith & Son* (7), and *Bradshaw v. Waterlow & Sons, Ltd.* (8)]

Sullivan K.C. and Lloyd Jones for the respondent. As the information against the appellant was prepared by the police, who for two months had the matter in hand pursuing their investigations, it cannot be said that the respondent acted without reasonable and probable cause. In *Abrath v. North Eastern Ry. Co.* (9) Lord Selborne pointed out that the inquiries there made, and, as we contend, those made in the present case, showed reasonable care on the part of the respondent before launching the prosecution. In *Lister v.*

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(1) [1918] A. C. 626, 663.

(2) (1847) 10 Q. B. 252, 260.

(3) (1883) 11 Q. B. D. 440, 455.

(4) (1824) 2 B. & C. 693.

(5) (1841) 2 Q. B. 169.

(6) (1846) 8 Q. B. 709.

(7) [1914] 1 K. B. 595.

(8) [1915] 3 K. B. 527.

(9) (1886) 11 App. Cas. 247.

H. L. (E.) *Perryman* (1) it was held that it was not unreasonable for an employer to act on a statement of his servant, whom he believed to be trustworthy, on which statement a prosecution was commenced but which resulted in an acquittal of the person accused. In *Bradshaw v. Waterlow & Sons, Ltd.* (2) the facts were analogous to those in the present case. There it was held that there cannot be an absence of reasonable and probable cause when the Attorney-General has granted his fiat for the prosecution, and it was not shown that the facts were put before him unfairly. [They also cited *M'Evoy v. James Calder & Co., Ltd.* (3)]
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Comyns Carr K.C. replied.

The House took time for consideration.

1937. Dec. 22. LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal setting aside a verdict and judgment for the plaintiff in an action for malicious prosecution tried before Talbot J. and a common jury and entering judgment for the defendant. The judge had left to the jury the following questions: 1. Has it been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud? (2.) Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution? (3.) Has it been proved that the defendant, in commencing or proceeding with the prosecution, was actuated by other motives than a desire to bring to justice one whom he honestly believed to be guilty?

The jury answered all three questions in the affirmative. The judge thereupon held that there was an absence of reasonable and probable cause, and as the third answer amounted to a finding of malice left the question of damages to the jury. They assessed the damages at 6500*l.* In the statement of claim, however, only 5000*l.* was claimed. The

(1) (1870) L. R. 4 H. L. 521.

(3) (1920) 55 Ir. L. T. R. 121.

(2) [1915] 3 K.B. 527.

judge refused leave to amend and entered judgment for the plaintiff for 5000*l*. H. L. (E.)

The defendant appealed and the plaintiff gave notice of cross-appeal against the order refusing leave to amend. On the latter point, at an early stage your Lordships intimated to counsel for the appellant that they were not disposed to interfere in a matter which in the circumstances depended so much on the discretion of the learned judge, and the question was not further pressed.

On the main question it is material to state that the plaintiff, together with one Rickard, was charged with conspiracy to defraud Harold C. Smith, the defendant, and with obtaining money from him by false pretences on four different occasions. They were charged before the justices at Edmonton on the information of Mr. Smith, committed for trial to the Central Criminal Court, tried there before the present Recorder, and convicted and sentenced each to twelve months' imprisonment. On appeal to the Court of Criminal Appeal the Court set aside the conviction, being of opinion in the case of Herniman that there was not a sufficient case to go to a jury, and that in all the circumstances it would be safer that the conviction against Rickard should be quashed as well. In these circumstances it was not disputed, and in my opinion could not be disputed, that the proceedings had terminated in favour of the present plaintiff so as to satisfy that essential element in an action for malicious prosecution.

The Court of Appeal held that there was no evidence which would justify the learned judge in leaving the first two questions to the jury; and being of opinion that there was no absence of reasonable and probable cause, allowed the defendant's appeal. It will be necessary therefore to examine the facts ascertained by the defendant at the time when he laid the information and subsequently proceeded with the prosecution. I need only state that the inquiry is confined to the effect or the reasonable effect of the evidence from time to time on Mr. Smith's mind; and that no question any longer remains as to the plaintiff's innocence which must be conclusively presumed.

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[His Lordship stated the facts as set out above and continued:] Upon this state of facts was there evidence of the want of reasonable and probable cause for the prosecution? I know of no better statement of the issue than the words of Hawkins J. in *Hicks v. Faulkner* (1): "I should define "reasonable and probable cause to be, an honest belief in the "guilt of the accused based upon a full conviction, founded "upon reasonable grounds, of the existence of a state of "circumstances, which, assuming them to be true, would "reasonably lead any ordinarily prudent and cautious man, "placed in the position of the accuser, to the conclusion that "the person charged was probably guilty of the crime "imputed." It is well settled that the question of the absence of reasonable and probable cause is for the judge. At the same time it is, I think, clear that the question is one of fact and not law: see *Lister v. Perryman* (2) per Lord Chelmsford (3) and Lord Westbury. (4) It is this circumstance of the decision of a material question of fact being confided to the judge that has given rise to disputes in a trial by jury as to what is the function of the jury. There is a danger lest the questions asked in this case, which are taken from the questions formulated by Cave J. in 1882 in the well known case of *Abrath v. North Eastern Ry. Co.* (5) should be asked in every case. This, it seems to me, would be to take the decision of the issue out of the hands of the judge to whom in the interests of prosecutor and accused alike it has been confided. The jury no doubt have important functions to perform. They are to find for the judge what the relevant facts are, when they are disputed. If there is any evidence of a lack of honest belief in the guilt of the accused on the part of the prosecutor, the fact whether he honestly believed or not is a disputed but essential fact on which the judge is to draw his conclusion and is a question for the jury. Questions may arise as to what the true facts are upon which the prosecutor acted. Were the statements, which he says were made to

(1) 8 Q. B. D. 167, 171.

(2) L. R. 4 H. L. 521.

(3) Ibid. 535.

(4) Ibid. 538.

(5) (1882) 11 Q. B. D. 79 ;
(1886) 11 App. Cas. 247.

him, in fact made? Were the documents, which he says he saw, in fact seen by him and in the form in which he says he saw them? If the evidence on which he acted for any cause reasonably apparent to him might be unreliable or incomplete, was he aware or should he in the circumstances of the particular case have been aware that there was other reliable evidence available? If there are specific points of genuine dispute between the parties in regard to such circumstances, the facts should be ascertained by the jury. But to ask the general question whether the defendant took reasonable care to inform himself of the true state of the facts appears to me in many cases merely to ask the jury what the judge has to decide for himself. The facts upon which the prosecutor acted should be ascertained; in principle, other facts upon which he did not act appear to be irrelevant. When the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused. I cannot think that Hawkins J. is right in *Hicks v. Faulkner* (1) when he says that the reasonableness of the accuser's belief in the existence of the facts on which he acted is a question of fact for the jury. It seems to me that that question together with the question whether the facts so believed amount to reasonable cause for believing the accused to be guilty, are for the judge. I do not think that much assistance is to be found in the numerous decisions upon this class of case. They most of them deal with the question of fact, what was reasonable and probable cause in the particular case, a question of fact over which the appeal tribunal has the same control as the trial judge. As decisions of fact they constitute no authority, except in precisely similar circumstances; and they should be treated accordingly. I do find, however, in the decision in *Bradshaw v. Waterlow & Sons, Ltd.* (2) statements of the law with which I agree and which appear to support the view I have above expressed.

Now, applying these principles to the particular case, was there any evidence of the want of reasonable and probable

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(1) 8 Q. B. D. 167, 172.

(2) [1915] 3 Q. B. 527.

H. L. (E.) cause ? Smith had the evidence of Edger : he was admittedly
1937 dishonest : and, if Smith had acted on his evidence alone, no
HERNIMAN doubt the plaintiff could have established his case. But
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— passes ; he tried to get copies from Herniman and failed ;
Lord Atkin. and then procured these through the police. When seen, some
— of these undoubtedly proved the truth of Edger's story as
to the delivery notes being faked. That Smith had been
defrauded in these cases was beyond question. That Rickard
was a party to the fraudulent alteration appeared probable,
for the incorrect general dimensions in the delivery note were
in Rickard's handwriting. At the time when the information
was laid Smith had Dean's statement that he had done
exactly the same thing as Edger and at Rickard's instigation.
It is true, and it is a very relevant consideration, naturally
much pressed by counsel for the appellant, that neither Edger
nor Dean professed to implicate Herniman. But the effect of
the evidence is that Herniman's delivery notes were fraudu-
lently prepared by the persons whom he authorized to fill
them up, that Herniman delivered invoices based on the
fraudulent quantities and that he obtained on those invoices
sums of money which were not due. The effect is that where
the fraudulent excess amounts to a standard, 14*l.* goes into
Herniman's pocket and the carrier's sole advantage, if
Herniman were innocent, would be the extra 1*l.* for carrying
the fictitious extra standard. In these circumstances, on the
facts ascertained by Smith, I think that they would induce a
conviction founded on reasonable grounds of the existence of a
state of circumstances which would reasonably lead any ordinary
prudent and cautious man placed in Smith's position to the
conclusion that Herniman was probably guilty of the crime
imputed. It is said that inquiries as to the course of business
would have shown that the orders were not necessarily
executed by delivery direct from the docks, but that sorting to
order took place at Rickard's yard. The answer is that in the
kind of case of which instances were given above the change
from dock to yard did not and could not have taken place.
It was further said that it might have been foreseen that

Edger made this alteration to enable him to conceal his own depredations at the yard. It does not seem to me that this explanation is sufficient ; it is very difficult to see how it could have happened without Rickard's complicity and, on the inference from motive therefore, Herniman's, and I can see no reason at all why Smith should have thought of it. It is true that Edger admitted certain thefts when cross-examined before the justices : but it is also true that the justices nevertheless thought, after a submission to the contrary, that there was a *prima facie* case, and that neither of the defendants gave evidence before the justices. I cannot see that Smith's position was any the worse after the depositions had been taken or that there is any reason to suppose that he should have been less inclined to believe in the case than the justices. It was further said that he should have asked for a further explanation from Herniman. No doubt circumstances may exist in which it is right before charging a man with misconduct to ask him for an explanation. But certainly there can be no general rule laid down, and where a man is satisfied, or has apparently sufficient evidence, that in fact he has been cheated, there is no obligation to call on the cheat and ask for an explanation which may only have the effect of causing material evidence to disappear or be manufactured. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution. In this case it must further be remembered, as was pointed out by junior counsel for the respondent, that during the whole time litigation was pending between Smith and Herniman in which the parties were necessarily at arm's length, and in which the issue of fraud was clearly raised and resisted in the affidavits on either side.

On the whole of the facts, therefore, which in deference to the forcible argument of appellant's counsel and in view of the importance of the case to the appellant, I have discussed at some length, I come to the same conclusion as the Court of Appeal, that there was no evidence on which the judge

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H. L. (E.) could leave any question to the jury, and that he should have decided that there was no want of reasonable and probable cause. Neither of the first two questions should have been left to the jury. There was no evidence to go to the jury in support of the affirmative of either of them. Whether independently of the want of reasonable and probable cause there was any evidence of malice is a question which in the circumstances becomes irrelevant. I think that this appeal should be dismissed.

LORD RUSSELL OF KILLOWEN. My Lords, I have had the opportunity of reading and considering the opinion of Lord Atkin and I agree with it.

LORD ATKIN. My Lords, I am authorized to say that Lord Macmillan, Lord Maugham and Lord Roche also agree with the opinion I have read.

Appeal dismissed.

Solicitors for appellant : *Crofts & Ingram and Wyatt & Co.*
Solicitor for respondent : *Nash & Co.*

[HOUSE OF LORDS.]

ROBINSON BROTHERS (BREWERS),	}	APPELLANTS ;	H. L. (E.)*
LIMITED			1938
AND			Feb. 17, 18,
COUNTY OF DURHAM ASSESSMENT	}	RESPONDENTS.	21, 22 ;
COMMITTEE (AREA No. 7)			March 17.

Rates—Licensed premises—Tied house—Competition of brewers occupying by manager—Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 22, sub-s. 1 ; s. 68.

In assessing a licensed public-house to rates there is no justification for including brewers among the competitors but excluding the rent they would be prepared to pay. The evidence of the rent they would be prepared to pay for its tenancy, whether they proposed to sublet it to a tied tenant or to occupy it themselves by a manager, is both competent and relevant in estimating the rent which a hypothetical tenant might reasonably be expected to pay, although it does not follow that the rent which could be obtained from a brewer is necessarily to be taken as the gross annual value. It is for the valuing authority to arrive at their valuation on the whole evidence, including evidence as to the extent of the demand for public-houses in the district, the parties likely to compete for them, whether brewers or others, the rents which those competitors would be likely to offer, and all other relevant considerations. Furthermore, it is well settled that in valuing a hereditament it is legitimate to have in view its importance as an adjunct of another hereditament: *Reg. v. London & North-Western Ry. Co.* (1874) L. R. 9 Q. B. 134 approved.

Bradford-on-Avon Union v. White [1898] 2 Q. B. 630 overruled. The fact that that decision has stood for forty years and has regulated the practice of rating during that period held not to preclude the House from overruling it on finding that it was erroneous in law and its operation unjust by placing an unjustifiable burden on the occupiers of other hereditaments.

Decision of Court of Appeal [1937] 2 K. B. 445 affirmed.

APPEAL from a decision of the Court of Appeal. (1)

The appellants, who were the occupiers of the White Lion Hotel, Houghton-le-Spring, in the County of Durham, were assessed in respect of the hotel at 112*l.* gross, and 90*l.* rateable,

(1) [1937] 2 K. B. 445.

* *Present* : LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

H. L. (E.) value. On December 7, 1934, they made a proposal to the assessment committee for the amendment of the list by reducing the assessment, but the committee decided to make no alteration. Thereupon the appellants gave notice of appeal to quarter sessions on the ground that the assessment was excessive having regard to the volume of trade. At the hearing of the appeal quarter sessions found the following facts: (a) The said hereditament is a fully licensed public-house and has been at all material times occupied by the company and managed by a manager in the employment of the company. All the draught beer sold and some of the bottled beer sold in the hereditament has at all material times been beer brewed by the company or by its associated company, but considerable quantities of bottled beer brewed by Messrs. Bass and Messrs. Worthington were also sold. (b) A large number of licensed public-houses in the committee's assessment area and elsewhere are occupied by brewers and managed by managers in the employment of such brewers. This practice was uncommon in the case of ordinary public-houses down to the time when *Bradford-on-Avon Union v. White* (1) was decided, and for some years thereafter. Practically all the public-houses in the assessment area are owned by brewers and either managed, as in the case of the said hereditament, or sublet to tied tenants. (c) A brewer taking a tenancy of the hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery and thus to secure a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make. (d) There were several brewers who, if the hereditament had been vacant and to let might reasonably have been expected to compete with each other for a tenancy of it. (e) If regard were had to the competition between brewers and to the rent which a competing brewer who desired the premises for the reasons mentioned in sub-para. (c) might be willing to give, the rent at which the hereditament might reasonably have been expected to let from year to year

(1) [1898] 2 Q. B. 630.

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would be sufficiently high to support a gross value of 112*l*. Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which it might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure. (f) If the competition of the brewers was taken into consideration but the rents which they might reasonably be expected to give for the reasons mentioned in sub-para. (c) hereof were excluded from consideration except so far as the possibility of such rents being given raised the rent which might reasonably be expected to be given by a tenant not influenced by these reasons, the rent at which the hereditament might reasonably have been expected to let from year to year would only be sufficiently high to support a gross value of 95*l*.

Quarter sessions being of opinion that they were bound by the decision in *Bradford-on-Avon Union v. White* (1) fixed the gross value at 95*l*., but if they had not considered themselves so bound they would have fixed the gross value at 112*l*.

The Divisional Court, also being bound by the decision in *Bradford-on-Avon Union v. White* (1), affirmed the decision of quarter sessions.

The Court of Appeal held that the decision in *Bradford-on-Avon Union v. White* (1) was wrong and that the gross value should be declared to be 112*l*.

The brewers appealed to this House.

Latter K.C. and *Michael E. Rowe* for the appellants. The question is whether in arriving at the rent which may reasonably be expected for a public-house it is right, as was held by the Divisional Court in *Bradford-on-Avon Union v. White* (1), to disregard the tied rent, if there is one, and while allowing for the fact of the competition of brewers in raising the rent in the market, to refuse to accept, as the rent reasonably to be expected, the high rent which the brewers themselves might be willing to give. We submit that the rent reasonably to be

(1) [1898] 2 Q. B. 630.

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H. L. (E.) expected is the sum which the landlord may be able to get from a tenant having no special qualifications other than those which fit him to run the house, any particular advantage he may have not being a determining factor.

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[LORD RUSSELL OF KILLOWEN. Why should not the rent a brewer would be willing to give be taken into account in arriving at the rateable value?]

The house is taken not for the purpose of a brewery, but as a shop in which beer is to be sold; and considerations of the person of the hypothetical tenant, for this purpose, have to be excluded: *Sunderland Overseers v. Sunderland Union* (1); *Poplar Assessment Committee v. Roberts*. (2) In the latter case *Bradford-on-Avon Union v. White* (3) was cited, and again in *Truman, Hanbury, Buxton & Co. v. Inland Revenue Commissioners* (4), and in neither was any doubt thrown upon its correctness.

[LORD ATKIN. In that last cited case Hamilton J. was bound by the *Bradford-on-Avon* case. (3)]

The decision was further referred to with approval in *Leney & Co. v. Whelan*. (5) When that case was before this House (6) *Bradford-on-Avon Union v. White* (3) does not appear to have been dealt with, but in *Inland Revenue Commissioners v. Crossman* (7) its principle was impliedly adopted by Viscount Hailsham L.C. Moreover, where a section of an Act of Parliament which has received a judicial interpretation is subsequently re-enacted in the same terms, the Legislature is to be deemed to have adopted that construction: *Ex parte Campbell* (8), *Greaves v. Tofield* (9), *Income Tax Commissioners v. Pemsel*. (10)

[LORD MACMILLAN referred to *Barras v. Aberdeen Steam Trawling & Fishing Co.* (11)]

In that case Lord Warrington appears to have taken the view for which we contend on the question of legislative

(1) (1865) 18 C. B. (N. S.) 531.

(2) [1922] 2 A. C. 93, 114.

(3) [1898] 2 Q. B. 630.

(4) [1912] 3 K. B. 377.

(5) [1934] 2 K. B. 511, 522.

(6) [1936] A. C. 393.

(7) [1937] A. C. 26.

(8) (1870) L. R. 5 Ch. 703.

(9) (1880) 14 Ch. D. 563.

(10) [1891] A. C. 531, 589 et seq.

(11) [1933] A. C. 402.

approval of language judicially interpreted; see also per Lord Russell of Killowen in the same case. (1)

[*Reg. v. London & North-Western Ry. Co.* (2) and *Rex v. New River Co.* (3) were also cited on the main question.]

Comyns Carr K.C. and *Frederick Grant* for the respondents.

In s. 68 of the Rating and Valuation Act, 1925, "gross value" is defined as meaning "the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent" There the word "reasonably" qualifies the expectation, not the rent, and once it is seen that x pounds may reasonably be expected for the tenancy that sum is to be taken. Here it is found as a fact that a rent of 112*l.* might reasonably be expected for the premises in question; therefore that sum is to be taken as the rent for rating purposes. In the case of public-houses it is known that brewers want them and are prepared to give a higher rent than other persons. Their competition and the rent they are willing to give cannot be left out of account. In *Reg. v. London & North-Western Ry. Co.* (4) it was held that in assessing a part of a branch line of railway, the fact that three or four companies would be willing to pay what was equivalent to a large rent for it, was to be taken into account in ascertaining the rent at which it might reasonably be expected to let from year to year. In that case Blackburn J. said (5) "the doctrine is as old as the case of the Amwell Spring (6), that the rateable value of an occupation may be enhanced by profit made elsewhere."

In *Great Central Ry. Co. v. Banbury Union* (7), Lord Dunedin said (8) that "in the Amwell Spring case (6), which I take to

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(1) [1933] A. C. 442.

(2) (1874) L. R. 9 Q. B. 134.

(3) (1813) 1 M. & S. 503.

(4) L. R. 9 Q. B. 134.

(5) Ibid. 141.

(6) *Rex v. New River Co.*

1 M. & S. 503.

(7) [1909] A. C. 78.

(8) Ibid. 93.

H. L. (E.) “be undoubted law, the Amwell lands were not spoken of
 1938 “as contributing to value elsewhere, but they were valued
 ROBINSON “at Amwell as being 300*l.* yearly value in respect of the
 BROTHERS “advantages which the uncontrolled possession of the spring
 (BREWERS), “gave to the occupants thereof”; see also *Reg. v. Rhymney*
 LD. “*gave to the occupants thereof*”; see also *Reg. v. Rhymney*
 v. Ry. Co. (1) In *Davies v. Seisdon Union* (2) this House decided
 DURHAM that, in assessing the tenants of a sewage farm in respect of
 COUNTY their occupation, the rating authority had to take into con-
 ASSESSMENT sideration not merely the actual rent paid by the tenants,
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 them to discharge their statutory duties, the tenants them-
 selves—a sewerage board—not being excluded from the list
 of hypothetical tenants. The decision in *Poplar Assessment*
Committee v. Roberts (3) has no relevancy to the present case,
 the question there being simply the effect of the Rent
 Restriction Acts in arriving at the value of the premises.
Sunderland Overseers v. Sunderland Union (4) merely decided
 that breweries could not be assessed by reference to the
 additional profit made by them as owners of tied houses. A
 misreading of that case probably accounts for the decision in
Bradford-on-Avon Union v. White. (5) *Reg. v. London School*
Board (6) supports our contention and negatives the suggestion
 that a particular bidder must be left out of consideration.
 See also *In re Ashby's Cobham Brewery Co.* (7), and *Truman,*
Hanbury, Buxton & Co. v. Inland Revenue Commissioners (8)
 the principle of which was not affected by the decision in
Inland Revenue Commissioners v. Crossman. (9) With regard
 to the contention that by reason of the decision in *Bradford-*
on-Avon case (5) having been accepted for so many years it
 should not be overruled, many instances are to be found in
 which an appellate tribunal has rejected the doctrine of *stare*
decisis, and in particular has done so in rating cases. In
Mersey Docks & Harbour Board Trustees v. Cameron (10)

(1) (1869) L. R. 4 Q. B. 276.

(2) [1908] A. C. 315.

(3) [1922] 2 A. C. 93.

(4) 18 C. B. (N. S.) 531.

(5) [1898] 2 Q. B. 630.

(6) (1886) 17 Q. B. D. 738.

(7) [1906] 2 K. B. 754.

(8) [1912] 3 K. B. 377.

(9) [1937] A. C. 26.

(10) (1865) 11 H. L. C. 443.

Lord Chelmsford said (1) in reference to this question that "the House cannot upon the principle of stare decisis, refuse "to examine the foundation upon which " previous cases rest.

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In *West Ham Union v. Edmonton Union* (2) Lord Loreburn L.C. said that "Great importance is to be attached to old "authorities, on the strength of which many transactions may "have been adjusted and rights determined. But where they "are plainly wrong, and especially where the subsequent "course of judicial decisions has disclosed weakness in the "reasoning on which they were based, and practical injustice "in the consequences that must flow from them, I consider "that it is the duty of this House to overrule them, if it has "not lost the right to do so by itself expressly affirming them "; see also *Great Western Ry. Co. v. Mostyn (Owners)* (3). This House is not bound by the decision in *Bradford-on-Avon* case (4) which we submit was wrong.

Latter K.C. in reply. The preamble to the Rating and Valuation Act, 1925, states that the object of the Act is to simplify and amend the law on the subject, and when it proceeds to amend the law it says so in precise terms ; it has not said anything to affect the principle laid down in the *Bradford-on-Avon* case (4) or the practice to which it gave approval, which therefore should not be disturbed.

The House took time for consideration.

MARCH 17. LORD ATKIN. My Lords, I am requested by the Lord Chancellor to say that he has had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Macmillan, and he agrees with it. I also agree with it.

LORD THANKERTON. My Lords, I also concur.

LORD RUSSELL OF KILLOWEN. My Lords, I also have had the same opportunity, and I agree with it too.

(1) 11 H. L. C. 510.

(2) [1908] A. C. 1, 4.

(3) [1928] A. C. 57, 73.

(4) [1898] 2 Q. B. 630.

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LORD MACMILLAN. My Lords, this appeal is concerned with the ascertainment of the gross annual value under the Rating and Valuation Act, 1925, of a fully licensed public-house known as the White Lion Hotel, at Houghton-le-Spring, in the County of Durham.

The hereditament having been entered in the current valuation list as of the gross annual value of 112*l.*, the appellants, who are the occupiers of the premises, made a proposal pursuant to s. 37 of the Act for an amendment of the valuation list by the reduction of this figure. The assessment committee, who are the present respondents, refused to make any alteration of the valuation. The appellants thereupon appealed to the court of quarter sessions of the county which allowed the appeal and fixed the gross annual value at 95*l.* The assessment committee, being dissatisfied with this decision, obtained a stated case for the opinion of the High Court on the question whether the "decision fixing "the gross value of the said hereditament at 95*l.* was correct "in law; and if not what ought to be done in the "premises."

The stated case came in the first instance before a Divisional Court composed of Lord Hewart L.C.J. and Humphreys and du Parcq JJ., who affirmed the decision of quarter sessions as correct in law. On appeal, the Court of Appeal (Greer, Slessor and Scott L.JJ.) reversed the decision of the Divisional Court and restored the original valuation of 112*l.* Your Lordships have now to determine finally this protracted controversy.

The precise findings of fact by the court of quarter sessions are of such importance that I propose to quote them verbatim from the stated case rather than attempt to paraphrase or summarise them. They are as follows:—“(a) The said “hereditament is a fully licensed public-house and has been “at all material times occupied by the company and managed “by a manager in the employment of the company. All the “draught beer sold and some of the bottled beer sold in the “said hereditament has at all material times been beer “brewed by the company or by its associated company but

"considerable quantities of bottled beer brewed by Messrs. H. L. (E.) Bass and Messrs. Worthington were also sold.

"(b) A large number of licensed public-houses in the Committee's Assessment Area and elsewhere are occupied by brewers and managed by managers in the employment of such brewers. This practice was uncommon in the case of ordinary public-houses down to the time when the case of *Bradford-on-Avon Union v. White* (1) was decided and for some years thereafter. Practically all the public-houses in the said assessment area are owned by brewers and either managed, as in the case of the said hereditament, or sub-let to tied tenants.

"(c) A brewer taking a tenancy of the said hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery and thus to secure a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make.

"(d) There were several brewers who, if the said hereditament had been vacant and to let, might reasonably have been expected to compete with each other for a tenancy of the said hereditament.

"(e) If regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-paragraph (c) hereof, might be willing to give, the rent at which the said hereditament might reasonably have been expected to let from year to year would be sufficiently high to support a gross value of 112*l.* Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure.

"(f) If the competition of the brewers is taken into consideration but the rents which they might reasonably be

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H. L. (E.) "expected to give for the reasons mentioned in sub-paragraph
 1938 " (c) hereof are excluded from consideration except so far as
 ROBINSON "the possibility of such rents being given raises the rent
 BROTHERS "which might reasonably be expected to be given by a tenant
 (BREWERS), "not influenced by those reasons, the rent at which the said
 LD. "hereditament might reasonably have been expected to let
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 DURHAM "a gross value of 95*l.*"
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Lord Macmillan. On these facts the court of quarter sessions, being of opinion that they were bound to follow the decision in the case of *Bradford-on-Avon Union v. White* (1), fixed the valuation at 95*l.*, but they added that if they had considered that they were not bound by that decision they would have fixed the gross value of the hereditament at 112*l.* The Divisional Court, in affirming the decision of quarter sessions, also held that they were bound by the authority of the *Bradford* case. (1) The learned Lords Justices of the Court of Appeal, not being bound by that case, were of opinion that it was wrongly decided, and being free to reconsider the whole matter held that on sound principles the original valuation of 112*l.* should be restored.

It will be at once apparent that the real question at issue centres round the *Bradford* case (1) and the principles there enunciated. This case was subjected to prolonged and searching analysis at your Lordships' bar, and it is necessary to examine it minutely, as I now proceed to do, in order to ascertain precisely what was there decided.

The Rising Sun Inn, the public-house in question in the *Bradford* case (1) belonged to a firm of brewers and was let by them to Mr. White as a tied house at a rent of 27*l.* 10*s.* The assessment committee, disregarding the tied rent, entered the premises in the valuation list at the gross estimated rental of 85*l.*; on objection they reduced the figure to 70*l.* The court of quarter sessions on appeal further reduced the assessment to 35*l.*, and their decision was affirmed by the Divisional Court (Ridley and Channell JJ.). The statute at that time regulating the matter was the Parochial Assessments Act, 1836,

which in s. 1 requires that the rate for the relief of the poor shall be made "upon an estimate of the net annual value of "the several hereditaments rated thereunto; that is to say, "of the rent at which the same might reasonably be expected "to let from year to year, free of all usual tenants' rates and "taxes, and tithe commutation rentcharge, if any, and "deducting therefrom the probable average annual cost "of the repairs, insurance, and other expenses, if any, "necessary to maintain them in a state to command such "rent." The language of the section of the Act of 1925 relevant to the present case, which I shall quote later, is substantially the same.

Upon the hearing of the appeal at quarter sessions "it was "alleged that in recent years there had been great competition "among rival firms of brewers in the district of Bradford-on-Avon and elsewhere for the purchase or renting on lease of "licensed houses for the purpose of letting or sub-letting them "to tenants as tied houses and of thereby increasing the sale "of their beer to such tenants." It was further proved "(a) that if brewers were to be included in the area of competition as possible tenants of the premises, though they did "not in fact intend themselves to occupy the same, but only "to convert such premises into a tied house for the sale therein "of their own beer, the rent at which the premises might "reasonably be expected to let would be sufficiently high to "support a gross estimated rental of from 40*l.* to 45*l.*; and "(b) that if such brewers were to be excluded from the area "of competition as possible tenants of the premises, and if "the said area of competition was to be restricted to such "intending tenants as would themselves occupy the premises "as ordinary tenants of a free house, the rent at which the "premises might reasonably be expected to let would only be "sufficiently high to support a gross estimated rental of from "30*l.* to 35*l.*"

The assessment committee did not support their valuation of 70*l.*, which had evidently been fixed on the basis of a tenancy for a term of years instead of from year to year as prescribed by the Act, but they maintained that in fixing

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The rival contentions of the parties were thus set out in the stated case :—

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“(11.) The appellant contended that the true test of the ‘net annual value of the premises within the meaning of the Act of 1836 was the rent that an ordinary tenant intending to occupy the premises from year to year as a ‘free’ house for the purpose of carrying on his own retail business as a publican would give, not what a brewer in competition with other brewers would give for the purpose of converting the premises into a ‘tied’ house for the exclusive sale of his (the brewer’s) beer, thereby increasing the profits of his own business.”

“(12.) The respondents contended that the net annual value of the licensed premises within the meaning of the Act of 1836 was their value to the owner, and not their value to the tenant in fact occupying the same, and that the premises should be assessed at the value at which they would let to a hypothetical tenant from year to year (all possible competitors who would be willing to take the premises from the owner being taken into account as possible hypothetical tenants), and that therefore the competition of brewers ought to be taken into consideration, although they did not in fact themselves intend to occupy the premises, and that the area of competition ought not to be restricted to such intending tenants as would themselves occupy the premises in question.”

In deciding that the gross estimated rental of the premises should be assessed at 35 $\frac{1}{2}$ l. the court of quarter sessions held that “in arriving at the gross estimated rental and rateable value it was the hereditament, independently of and without reference to, any personal contract with brewers that had to be assessed—in fact, the ‘free’ house, not excluding brewers as competitors but treating them, like other tenants from year to year, as tenants of an hereditament unfettered by any personal contract.”

These ample quotations show the nature of the problem as

it came before the Divisional Court and have been rendered necessary in order to comprehend what was there decided. Ridley J. said (1) "The hypothetical tenant is to be a tenant "supposed to take the hereditament as it stands, and used "as it is, so far as the use of the premises goes—that is to "say, as a public-house, as ironworks, or a dwelling-house, as "the case may be; but whilst that is true, the value of the "hereditament is not to be affected by contracts or conditions "not directly bearing on the occupation or use of the property, "but of a personal and collateral character. Now, in this "present case the contention of the appellant below, as set "out in paragraph 11 of the case, appears to me to be correct "according to the rules above stated. The 'ordinary tenant "'intending to occupy the premises from year to year as a "'free" house' is in the same position as the hypothetical "tenant of the statute, and he is willing to give the rent for "the premises not for the business carried on upon them." Dealing with the respondents' contention in paragraph 12, the same learned judge interpreted it as meaning "that not "only the competition which would be due to the situation "and character of the hereditament was to be taken into "account, but also the competition of brewers intending to "use the premises as a tied house" and proceeded:—"In so "far as this contention introduces into the estimate an element "not referable to the rateable hereditament itself, but to some "personal or temporary contract under which the business is "to be carried on upon it, I think it is clearly wrong." In his opinion, "though the competition of brewers was not to "be excluded in estimating the rent, they must be treated "like other tenants from year to year of an hereditament "unfettered by personal contract."

It was suggested that the views expressed by Channell J. were not entirely consistent with those expressed by his colleague. Thus Ridley J., in one of the passages above quoted, says that the contention of the appellant as set out in paragraph 11 appeared to him to be correct, whereas Channell J., with reference to the same paragraph, said (2),

(1) [1898] 2 Q. B. 635.

(2) Ibid. 637.

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 ROBINSON "it in the terms in which it is stated, though perhaps there
 BROTHERS "is no substantial inaccuracy." In the result, however, I do
 (BREWERS), not think that there was any real difference of view between
 LD. the learned judges as to the principles which they held to be
 v. applicable, although Channell J. is more explicit in their
 DURHAM statement, as shown in the quotations which I am about to
 COUNTY give. "If in fact," he says, "there are so many competitors,
 ASSESSMENT COMMITTEE. "whether brewers or others, desiring to obtain possession of
 Lord Macmillan. "public-houses as to raise the value of public-houses in the
 "district (the number of which is of course limited), that
 "fact necessarily affects the sum which any tenant, whether
 "brewer or not may reasonably be expected to give; he will
 "have to give that which the landlord will expect to get from
 "others, or he will not be taken as tenant. I think that any
 "circumstances which affect the annual value in the market
 "must be taken into consideration in arriving at the gross
 "estimated rental—that is, at the sum which may reasonably
 "be expected to be obtained from a tenant from year to year;
 "and therefore the demand which exists for public-houses,
 "whether by brewers or others, must be considered, for that
 "demand directly affects the value. The contention of the
 "appellant is, however, well-founded to this extent—any sums
 "which are paid by the tenant not by reason of the value of
 "the premises, but for reasons personal to himself, ought not
 "to be taken into account." Again, the learned judge thus
 defines his position (1)—"where such a demand for houses
 "by brewers exists as to make it reasonable to expect that a
 "landlord could get from anyone a higher rent for his public-
 "house than he would if that demand of the brewers did not
 "exist, then that higher rent is a rent which may reasonably
 "be expected to be obtained for the premises within the
 "meaning of the Act of 1836, and the rating will be higher
 "than if the demand did not exist. I do not think, therefore,
 "that it is right to say that the competition of brewers should
 "be wholly excluded from consideration, but the special prices

“which they may give, owing to personal considerations, and
 “not on account of the value of the premises, should be
 “excluded except so far as the possibility of such special
 “prices being obtained raises the market value generally.
 “The contention of the respondents, which is stated in paragraph
 “12 of the case, appears to me to be correct, subject only to the
 “doubt as to what is meant by the ‘competition of brewers
 “‘being taken into consideration.’ If that means that the
 “question should be considered whether the competition of
 “brewers had raised the market value of public-houses in the
 “district, then, in my opinion, it is right. If, however, it
 “means that the special values which the brewers may, for
 “reasons connected with their own business, be willing to
 “give are to be treated as the gross estimated rental of the
 “premises, because those sums might be obtained from
 “brewers, then, in my opinion, it is wrong.”

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I have quoted the learned judges thus extensively both out of respect to their eminence and experience and in my anxiety lest I should seem to do injustice to their views. As I read these passages I understand the principle which they embody to be that in the letting market for public-houses you are to assume the presence of brewers as bidders but to exclude consideration of the rents which they would offer. In short, the competition of brewers is to be taken into account quantitatively but not qualitatively. By their presence in the market they add to the number of competitors and so tend to increase the rent which will be offered on the principle that the more numerous the competitors, the keener the market; but the rent which the brewers would be prepared to offer must be disregarded and all the competitors (whether brewers or others) must be regarded as competitors for the tenancy of a public-house which is to be occupied and conducted as a free house. This, your Lordships were given to understand, is how the judgment has been interpreted and applied in practice; and this is how it has been interpreted and applied by the court of quarter sessions in the present case.

I find myself quite unable to accept such a method of

H. L. (E.) valuation. The Rating and Valuation Act, 1925, s. 68, sub-s. 1, defines "gross value" to mean the "rent at which 1938
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"a hereditament might reasonably be expected to let from "year to year," on certain assumptions immaterial for the present purpose. It is not the rent at which the hereditament is actually let, unless that happens to be the rent at which it might reasonably be expected to let. It is the rent which a hypothetical tenant might reasonably be expected to pay. The hypothetical tenant may reasonably be expected to pay the rent which in the letting market for such premises would be offered as the result of the competition existing in that market. The valuing authority must gauge both the extent of the competition in the market and the rent likely to be offered and accepted in that market. In the case of a public-house I can see no justification for including brewers among the competitors but excluding the rent which they would offer. The motives which actuate buyers in a market may be of all kinds, but it is not their motives but their bids that matter. In the case of trade premises the competitors for the tenancy are presumably always actuated by a consideration of the profit which they think they can make by utilising the premises, and they will have this in view when they make their bids. The brewer who wishes the premises because he thinks he can make money by sub-letting them to a tied tenant is influenced by perfectly legitimate business considerations; he offers the rent which he thinks it worth his while to pay to obtain the tenancy. Why should the rent which he is prepared to pay be excluded from consideration in fixing the market value of the tenancy? He is one of the competitors in the market, and the figure which he is prepared to pay is an element which ought clearly to be taken into account in arriving at the market price.

The reasoning in the judgments in the *Bradford* case (1), appears to me to confuse two quite different things. Where, as between landlord and tenant, personal elements extraneous to the ordinary relation of lessor and lessee are introduced into the contract of tenancy then the so-called rent paid is not

rent in the economic any more than in the legal sense. As the phrase goes, there is present a consideration other than the rent. Of this there is no better instance than the so-called rent paid by a tied tenant, for the rent is artificially reduced by reason of the personal restrictions imposed on him. Consequently the tied rent is properly disregarded in determining what rent the hypothetical tenant might reasonably be expected to pay on ordinary terms. But the rent which a brewer is prepared to pay for the tenancy of a public-house because he sees his way to make a profit for himself by sub-letting it to a tied tenant is not vitiated by any such consideration as applies between the brewer and his tied tenant. The brewer thinks that he can make a profitable use of the premises by sub-letting them to a tied tenant and so is disposed to offer a high price for the tenancy. The object of making a profitable use of the premises is just the ordinary motive which actuates competitors in a letting market. One of the attractions which a public-house offers in the market is the facility of letting it to a tied tenant. As between the brewer and the landlord to whom the brewer makes his offer of tenancy there is no question of any "personal or temporary contract under which the business is to be carried on" upon the premises such as the learned judges in the *Bradford* case (1), rightly say ought to be excluded from consideration. Nor in taking into account the rent which a brewer would pay is there any violation of the principle that the valuation must be *rebus sic stantibus*; it is precisely because the hereditament is a public-house and is to continue to be used as such that it attracts the brewers' competition.

The unsoundness of the view taken in the *Bradford* case (1) becomes even more manifest when it is sought to apply it to the circumstances of the present case. In the *Bradford* case (1), the brewers were desirous of becoming tenants in order that they might in turn sub-let to a tied publican; in the present case it appears that a large number of the public-houses in the area, including the White Lion Hotel itself, are occupied by brewers and managed for them by managers in

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their employment. The growing practice apparently among brewers is to occupy public-houses themselves and sell their own beer in them through a manager whom they employ in the premises. Here there can be no question of any personal contract or restriction entering into and vitiating the rent which the brewer is prepared to offer for the tenancy. The case is just the same as that of any manufacturer who rents shops for the retail sale of his goods. Why should the rent which manufacturers are willing to pay not be taken into account assuming them to be proved to be in the market for shops?

I may notice, in order to dispose of it, a suggestion that the rent which a brewer would pay ought not to be taken into account for the reason that he is in a position to pay that rent only because he is the owner of another hereditament—namely, his brewery, and that the profit which he has in view is not the profit to arise from occupancy of the public-house, but the enhanced profits of his brewery. It is, however, well settled that in valuing a hereditament it is legitimate to have in view its importance as an adjunct of another hereditament: *Reg. v. London & North-Western Ry. Co.* (1) In the case where the brewer sells his own beer in the public-house which he rents he no doubt benefits his brewery by having an assured channel for the disposal of his beer, but the profit is actually made where the sales are effected, that is, in the public-house.

While therefore evidence as to the rents which brewers would be prepared to pay for the tenancy of a public-house, whether they propose to sub-let it to a tied tenant or to occupy it themselves through a manager, is in my opinion both competent and relevant in estimating the rent which a hypothetical tenant of the public-house might reasonably be expected to pay, it by no means follows that the rent which would be obtained from a brewer is necessarily to be taken as the gross annual value. There may not be many brewers in the district looking out for public-houses to let and the chance which a public-house in the particular locality has of being let to a brewer willing to pay a high rent may be small.

It is for the valuing authority to arrive at their valuation on the whole evidence, including evidence as to the extent of the demand for public-houses in the district, the parties likely to compete for them, whether brewers or others, the rents which these competitors of all classes would be likely to offer and all other relevant considerations. In the present stated case it will be noted that the figure of 112*l.* is not said to be the rent which a brewer would be willing to pay for the White Lion Hotel; but that the rent at which the hereditament might reasonably be expected to let from year to year would be sufficiently high to support a gross value of 112*l.*, if regard be had to the competition between brewers and to the rent which a competing brewer who desired the premises in order to secure the use of them for the sale of beer from his own brewery might be willing to give. As, on the facts found in this case, it was in my opinion proper to have regard to the competition of brewers and to the rents which they might offer, it follows that the figure of 112*l.* ought to be taken as the gross value of the premises.

I do not think that it would serve any useful purpose to examine the numerous cases that were cited in the course of the debate, especially in view of the very exhaustive survey of the authorities undertaken by Scott L.J. in the Court of Appeal. The result of that survey amply supports the conclusion at which the Court arrived, and which also commends itself to me.

It is right, however, that I should notice an argument which was strenuously advanced by the appellants, namely, that even if your Lordships should be dissatisfied with the soundness of the decision in the *Bradford* case (1) this House should not disturb it in view of the fact that it has stood for forty years without being over-ruled and has regulated practice during that long period. The case is not a favourable one for the application of the doctrine of *stare decisis*. The decision on behalf of which it is invoked is both embarrassing and unjust—embarrassing, because even the experienced counsel who appeared at your Lordships' bar had considerable difficulty

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H. L. (E.) in explaining precisely what it decided and what evidence it ruled out, and to valuation authorities it is not likely to be more easy of comprehension ; unjust, because the unduly low valuation of public-houses to which it has given rise places an unjustifiable burden on the occupiers of other hereditaments.

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In the recent case of the *Westminster Council v. Southern Ry. and W. H. Smith & Son* (1) your Lordships over-ruled a much more venerable rating decision and I see no reason why more indulgence should be extended to the *Bradford* case. (2) It was also sought to found an argument on the principle recently considered by this House in the case of *Barras v. Aberdeen Steam Trawling & Fishing Co.* (3) to the effect that where Parliament in re-enacting legislation uses language which has been the subject of judicial interpretation it must be presumed to have used that language in the sense in which it has been judicially interpreted. I ventured in the case I have just cited to suggest some obvious limitations of the scope of this doctrine. I recognize that where a term or expression which has an established judicial connotation occurs in a statute Parliament may well be taken to have employed it in conformity with this usage. But it would be reducing the doctrine to an absurdity to hold that Parliament in repeating in the Act of 1925 the general terms used in the Act of 1836 to define annual value thereby gave Parliamentary sanction to every one of the innumerable and not always consistent decisions on the subject of the hypothetical tenant and the rent which he may be reasonably expected to pay.

I am accordingly of opinion on all grounds that the present appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants : *Godden, Holme & Ward.*

Solicitors for respondents : *Richardson, Sadler & Co., for Hannay & Hannay, South Shields.*

(1) [1936] A. C. 511.

(2) [1898] 2 Q. B. 630.

(3) [1933] A. C. 402.

[HOUSE OF LORDS.]

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AND

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Jan. 24,
25, 27 ;
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Revenue—Income tax—Loan by bank—Interest debited by bank to loan account—Application by borrower to recover income tax on interest so debited—Payment of interest “out of profits and gains brought into charge to tax”—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 36, sub-s. 1.

Sect. 36, sub-s. 1, of the Income Tax Act, 1918, provides that “Where interest payable in the United Kingdom on an advance from a bank carrying on a bona fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest.”

In 1918 F. borrowed from a bank 250,000*l.* on the security of certain property. At the material date F. had paid nothing on the account in reduction of principal or interest, the bank debiting the account each half-year with the interest thereon, and carrying forward the accumulated amount :—

Held, that the action of the bank in so debiting the account with interest did not constitute as between it and F. a payment of interest by F. within the meaning of s. 36, sub-s. 1, of the Income Tax Act, 1918, so as to entitle the trustee of F.’s estate to recover the amount of income tax thereon.

Reddie v. Williamson (1863) 1 Macph. 228 and *Inland Revenue Commissioners v. Holder* [1931] 2 K. B. 81 discussed.

Decision of the Court of Appeal (reported sub nom. *Fenton’s Trustee v. Inland Revenue Commissioners* [1936] 2 K. B. 59) affirmed.

APPEAL from a decision of the Court of Appeal (reported sub nom. *Fenton’s Trustee v. Inland Revenue Commissioners*) (1) affirming a decision of Finlay J.

The appellant was the surviving trustee of two deeds of arrangement executed by Henry Fenton, and he claimed repayment of income tax for the years ending April 5,

(1) [1936] 2 K. B. 59.

* *Present* : LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD MAUGHAM.

H. L. (E.) 1921, and April 5, 1922, under s. 36 of the Income Tax Act, 1918, which provides as follows: "(1.) Where interest
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"payable in the United Kingdom on an advance from a bank
 "carrying on a bona fide banking business in the United
 "Kingdom is paid to the bank without deduction of tax out of
 "profits or gains brought into charge to tax, the person by
 "whom the interest is paid shall be entitled, on proof of the
 "facts to the satisfaction of the special commissioners, to
 "repayment of tax on the amount of the interest."

The facts were in substance as follows: Henry Fenton had a total income for the relevant year of 26,301*l.* computed in the manner provided by the Acts and taxed either by deduction or by direct assessment. Out of the income certain charges were paid, namely 1506*l.* for ground rent and loan interest paid under deduction of tax and 17,018*l.* for bank interest on loan accounts with banks other than Martins Bank. This bank interest was paid without deduction of tax, and in respect of these interest payments claims for repayment of tax made under s. 36 were admitted. That left a balance of income over these charges of 7777*l.* It was in respect of that sum that the claim for repayment of income tax now in dispute was made.

The case stated by the Special Commissioners stated that Fenton had borrowed various sums from the Halifax Commercial Banking Company, now Martins Bank. The most important of these accounts and the only one material was that which was called the Labrador Account. In 1918 Fenton borrowed from the bank 250,000*l.* on the security of the Mingan Estate, Labrador. The case found that up to the date of the hearing before the Special Commissioners nothing had been paid on that account in reduction of principal or interest, the charges including the interest being debited each half-year and added to the principal. In consequence of the addition to the debt of these sums from time to time, by June 30, 1921, the debit balance of the account stood at 302,973*l.* 2*s.* 8*d.* The bank certified that the amount charged as interest for the year 1920-1921 to the Labrador Account was 22,402*l.* 4*s.* 7*d.* The certificate did not certify that any payment had been made. The

account headed "Labrador Account" showed at each half-yearly period the debit balance carried forward, then at the end of the period showed the interest and cable expenses to Canada, which were added as further debits, and the increased balance was carried forward to the next half-year. There was nothing in the case stated to show what was done with the balance of income of 7777*l.*, but it was not suggested that it was in fact employed in connection with the interest on the Labrador Account.

It was contended on behalf of the appellant (1.) that in view of the bank's practice of adding the interest of each half-year to the amount advanced, the interest in question had in fact and in law been paid each half-year, and (2.) that, to the extent that Fenton had taxed income for the year in question, the interest must be deemed to have been paid out of profits or gains brought into charge to tax within s. 36 of the Income Tax Act, 1918. On behalf of the Crown it was contended (1.) that the interest debited to the accounts had not been paid within the meaning of s. 36; (2.) alternatively the interest had not been paid out of profits or gains brought into charge to tax but had been paid out of further advances from the bank.

The Special Commissioners held, with regard to the Labrador Account, that, even if the interest had in fact been paid, it had not been paid out of profits or gains charged to income tax, but had been paid out of further advances from the bank, and that the claim failed.

Finlay J. and the Court of Appeal, in view of the decision in *Inland Revenue Commissioners v. Holder* (1), regarded themselves as bound to hold that the interest in question must be deemed to have been paid within the statutory meaning, and on the further question Finlay J. held that the interest which he assumed to have been paid had not been paid out of profits or gains brought into charge to tax, and so did the majority of the Court of Appeal (Greene L.J. dissenting).

The trustee under the deeds of arrangement appealed.

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1938. Jan. 24, 25, 27. *Latter K.C.* and *F. Heyworth Talbot* (*Needham K.C.* with them) for the appellant. The Court of

(1) [1931] 2 K. B. 81.

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Appeal determined the question involved by reference to the actual source from which the money came to make the payment of interest, that is, it was said, the payment was made out of a further advance from the bank, and on that account the claim for repayment of tax was held to be inadmissible. We submit that the Court was wrong in so holding. A line of authorities has treated it as quite irrelevant from what source the money comes. If the money had been borrowed by Fenton from another bank, the claim would clearly succeed. Why then should a different rule obtain if the money is borrowed from the same bank? The Legislature must have been well aware of the practice between bankers and customers, and must be taken to have intended that s. 36 of the Income Tax Act, 1918, should benefit the taxpayer in ensuring that the Crown did not receive tax twice on the same amount. In *Luipaard's Vlei Estate and Gold Mining Co. v. Inland Revenue Commissioners* (1) Rowlatt J. said (2): "Certain authorities have been cited to me, beginning "with *London County Council v. Attorney-General* (3), and "continuing to *Sterling Trust, Ltd. v. Inland Revenue Commissioners* (4), which establish that, if a sum is brought into "charge out of which the interest is payable and that sum is "available . . . there is no need to inquire into what account "the amount has been brought, or out of what back money "it has been taken, but, if the fund is there and the interest "has been paid, it is considered to have been paid out of the "fund within the meaning of the rule." The position between Fenton and the bank was that the interest on the advance was added each half-year, but it still continued to be interest. In *Inland Revenue Commissioners v. Holder* (5) the Court of Appeal held that in such circumstances the interest was paid, but the point was not dealt with when the same case was before this House. (6) The interest, moreover, must be taken to have been paid out of taxed income, for when a taxpayer has taxed income he must be treated as having paid interest on loans out of it: *London County Council v. Attorney-General* (3);

(1) [1930] 1 K. B. 593.

(2) *Ibid.* 602.

(3) [1901] A. C. 26.

(4) (1925) 12 Tax Cas. 868.

(5) [1931] 2 K. B. 81.

(6) [1932] A. C. 624.

see also *Edinburgh Life Assurance Co. v. Lord Advocate*. (1) H. L. (E.)

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondents. The authorities are inconsistent with the notion that interest is paid by means of a fresh advance : *Ex parte Bevan* (2) ; *Eaton v. Bell*. (3) As was said by Lord Justice-Clerk Inglis in *Reddie v. Williamson* (4) : "where an account [in the bank's books] is kept in this way consistently throughout its whole "course, the interest thus accumulated with principal, at the "end of each year not only becomes principal, but never "thereafter ceases to be dealt with as principal" : see also *Inland Revenue Commissioners v. Holder*. (5) In *In re Jauncey. Bird v. Arnold* (6) Russell J., in dealing with a contention that where in a mortgage deed containing a provision that, whenever interest was in arrear for twenty-one days, it should be treated as an accretion to the capital moneys and should thenceforth bear interest, interest must be deemed to have been paid, said that "the interest is not capitalized because it "is in fact paid, but because it has in fact not been paid." That decision clearly negatives the contention of the present appellant.

[They were stopped.]

Latter K.C. replied.

The House took time for consideration.

March 4. LORD ATKIN. My Lords, the question in this case arises on the claim of the appellant, trustee under two deeds of arrangement executed in 1921 by Mr. Henry Fenton, to have repaid to him under the provisions of s. 36 of the Income Tax Act, 1918, money which he says Mr. Fenton in the financial years ending April 5, 1921, and April 5, 1922, paid without deduction of tax out of profits and gains brought into charge as interest payable on an advance from Martins Bank. The Commissioners say that Mr. Fenton did not pay the interest in the years in question or at all, and that, if he did, he did not pay out of

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(1) [1910] A. C. 143.

(2) (1803) 9 Ves. 223.

(3) (1821) 5 B. & Ald. 34.

(4) (1863) 1 Macph. 228, 236.

(5) [1931] 2 K. B. 81, 94.

(6) [1926] Ch. 471, 476.

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profits and gains brought into charge. Finlay J. and all the members of the Court of Appeal held themselves bound, as they were, by a previous decision of the Court of Appeal in the *Inland Revenue Commissioners v. Holder* (1) to decide that the interest had been paid: they differed as to whether it had been paid out of profits and gains brought into charge, Lord Wright, then Master of the Rolls, and Romer L.J. holding that it had. Counsel for the appellant have been heard on both points, but your Lordships did not find it necessary to decide the second point, and have not heard the Attorney-General upon it, and I express no opinion with regard to it. I am myself satisfied that the facts found by the Special Commissioners do not disclose any payment of the interest in respect of which the claim is made. The transaction with the bank is a simple one. In October, 1918, the bank advanced to Mr. Fenton the sum of 250,000*l.* to complete the purchase of the share capital of a company in Labrador owning a large forest property. They took as security the shares in the company. The account is kept as an ordinary bank account and is not styled a loan account. Throughout there are no credit items: but the account is debited with cables to Canada, no doubt in connection with the transaction, and with small commissions to the Canadian bank through whom the transaction had been completed. At the end of the first half-year in December, 1918, the bank debit the account with charges, 408*g**l.* 5*s.* 3*d.*, which includes interest, and show a debit balance of 254,121*l.* 12*s.* 7*d.* made up of the original advance of 250,000*l.*, the amount of the cables and commission referred to and the above sum for "charges." The account, balanced on December 23, 1918, begins the next half-year period on December 23 with a debit item "to balance 254,121*l.* 12*s.* 7*d.*" There are no entries for the half-year until June 23, 1919, when charges 7602*l.* 14*s.* 7*d.* are debited. The account is then balanced at 261,724*l.* 7*s.* 2*d.* and that balance is again brought down as the first debit item in the next half-year's account, which is balanced on December 31, 1919, at 270,349*l.* after debiting charges 8613*l.* 7*s.* 7*d.* together with small sums for cables. We now come to the year

1920 in which the first year of charge in the present case begins. In the first half-year the balance of 270,349*l.* 6*s.* 2*d.* is brought down and in addition to a few pounds for cables and payment to the Canadian bank on June 30 charges 9999*l.* 16*s.* 3*d.* are debited and the balance shown is 280,364*l.* 11*s.* 2*d.* I may set out the next two half-years' accounts :—

1920	£	s.	d.	
June 30. To balance	280,364	11	2	
Dec. 31. Charges	11,306	15	5	Dec. 31, 1920
				By balance
				291,671 <i>l.</i> 6 <i>s.</i> 7 <i>d.</i>
	291,671	6	7	
Dec. 31. To balance	291,671	6	7	
1921				
June 4. Stp. & Fees				
on				
Equit. charge	10	10	0	June 30, 1921
June 24. Charges	11,291	6	1	By balance
				302,973 <i>l.</i> 2 <i>s.</i> 8 <i>d.</i>
	302,973	2	8	
June 30. To balance	302,973	2	8	

The question is whether when the charges are added to the existing indebtedness at the end of one half-year, and the whole sum brought down is a debit item at the beginning of the next half-year so that interest is charged on the last half-year's interest, the charges have been paid. The ordinary man would, I think, say that so far from being paid they are added to the ordinary indebtedness because they are not paid : and I can see no reason why the law should say anything different. It is obvious that the system adopted by banks, which seems to have been common practice in Lord Eldon's time, is for the purpose of giving them compound interest without perhaps flaunting that fact before their customers.

It would seem that the members of the Court of Appeal in *Holder's* case (1) considered that there was a line of authority which led them to the conclusion that in these circumstances the interest must in law be deemed to have been paid. I do

(1) [1931] 2 K. B. 81.

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H. L. (E.) not think that this is the result of the cases. *Ex parte Bevan* (1) was a case of a petition in bankruptcy to be allowed to prove. One objection made was "that in settling accounts half-yearly "interest had been turned into principal." At that time the statute of 12 Anne (2.) c. 16 was in force, which made illegal a contract to pay interest at a higher rate than 5 per cent. per annum. It does not appear from the report what was the nature of the debt or what were the occupations of either petitioner or debtor. Lord Eldon said: "As to the question of "compound interest, it is clear that you cannot a priori agree "to let a man have money for twelve months, settling the "balance at the end of six months; and that the interest shall "carry interest for the subsequent six months: that is, you "cannot contract for more than 5 per cent.; agreeing to "forbear for six months. But, if you agree to settle accounts "at the end of six months, that not being part of the prior "contract, and then stipulate, that you will forbear for six "months upon those terms, that is legal." There is here not a suggestion of payment. The only question for Lord Eldon was the supposed illegality. An antecedent (a priori) agreement for half-yearly rests, and interest upon the balance, would be void. But if you settle, i.e., agree the balance at the end of six months, there is nothing to prevent your making a fresh start with the total debt which no doubt includes interest: and agreeing to forbear from suing for the whole debt at a rate of interest meantime. In *Eaton v. Bell* (2) the plaintiffs were bankers and had held the defendant's account for a number of years, making up the accounts with half-yearly rests in pursuance of the practice above described. Both counsel and Abbott C.J. refer to the question as one of compound interest, and the Chief Justice says: "It is now settled, that a party advancing "money to another is entitled to charge interest, and at the "end of every year, then to add the principal to the interest." Later he describes the process as converting the interest from time to time into capital. There is again not a word as to payment, and why it should be considered authority for the contention I do not know. I should have mentioned in order

(1) 9 Ves. 223.

(2) 5 B. & Ald. 34, 40.

of date *Lord Clancarty v. Latouche*. (1) There the plaintiffs had brought an action against the defendants, bankers of one Conolly, whose executors the plaintiffs were, for an account of their testator's transactions. The plaintiffs had objected to the system of yearly rests. Lord Manners, the Lord Chancellor, directed yearly rests "for otherwise the defendants would not "have legal interest for their money. If the interest were paid "to them regularly at the end of the year, that interest in their "hands would become capital, and be invested; if it were not "paid, they would not, at the end of the second year, receive "legal interest upon the whole of the debt due to them from "Mr. Conolly, unless that part of the debt, which consisted "of interest due at the end of the first year, was treated as "capital; what is there in law or equity against this "transaction?" It will be observed, that the Lord Chancellor, so far from deeming the interest paid, considered it unpaid and relies on that fact to justify treating it as capital. Then comes the case of *Reddie v. Williamson* (2), which has the high authority of Lord President Inglis, then Lord Justice-Clerk. In that case the dispute was between a co-obligant on a cash credit bond given to a bank by the pursuer and his son, who was the customer of the bank. The bond was for 400*l.* and interest. The account had been kept with yearly rests in accordance with the usual custom, and at the date of the death of the customer in 1850 showed, in accordance with the last balance of May 30, 1849, an indebtedness of 834*l.* The question was whether, as the pursuer claimed, the amount due was 400*l.* with interest from May 30, 1849: or whether, as the bank claimed, the amount was 400*l.* with interest from January, 1844, the first date at which 400*l.* principal became due on the account. The decision of the Second Division of the Court of Session was that the former view was right, interest on 400*l.* having been extinguished from year to year by being added to principal in accordance with banking practice. The statement of the Lord Justice-Clerk must be set out at some length. After stating that the co-obligants are bound to pay up the interest at the end of the year, though the principal sum be

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(1) (1810) 1 Ball & B. 420.

(2) 1 Macph. 228.

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"demanding from the co-obligants the interest due at the end
 "of the year, choose, in concert with the obligant who is
 "authorised to operate on the account, to avail themselves of
 "their privilege of accumulating that interest with the capital,
 "without any communication with the other obligants, they
 "are dealing with the account, as far as these other obligants
 "are concerned, in precisely the same way as if the leading
 "obligant, instead of paying the interest otherwise at the end
 "of the year, had given the bank a cheque for the amount on
 "the cash credit account with which the bank extinguished
 "the interest, and then placed the amount of the cheque to
 "the debit of the cash account as an ordinary draft. In this
 "last case there can be no doubt, that the credit would be
 "additionally exhausted proportionally to the amount of the
 "cheque given in payment of the interest ; and if the full sum
 "of the credit had been previously drawn out, the cheque for
 "the interest would be an unauthorised overdraft, for which
 "the other co-obligants could not be made answerable. But
 "does it make any difference, that without a cheque the same
 "amount is placed to the debit of the account, and thereafter
 "dealt with as a principal sum drawn out ? I think not. The
 "privilege of a banker to balance the account at the end of the
 "year, and accumulate the interest with the principal, is
 "founded on this plain ground of equity, that the interest
 "ought then to be paid, and, because it is not paid, the debtor
 "becomes thenceforth debtor in the amount, as a principal
 "sum itself bearing interest." As I understand this judgment
 the Lord Justice-Clerk, so far from saying that the interest
 is paid or is deemed to be paid, is saying that it is unpaid, and,
 because unpaid, the customer becomes debtor in the account
 as a principal sum. The position of the co-obligants, he says,
 in such a case is like that which would arise if the interest
 had been charged by a cheque drawn on the account when
 the principal sum would be increased by the amount of the
 cheque. A misfortune in the case is that Lord Cowan, mis-
 interpreting, as I venture to think, the analogy adopted by the

(1) 1 Macph. 237.

Lord Justice-Clerk, goes further and says in a passage cited in *Holder's* case (1) by Romer L.J. that the true view is the periodical interest must be held to have been paid when placed to the debit of the account as an additional advance by the bank for the convenience of the obligants. This seems to me contrary to what was said by the Lord Justice-Clerk, and to be wrong. The simple fact is that the amount of interest accruing during the half-year is ascertained at the end of the half-year and is added to the account as a debt in precisely the same position as the other debit items whether for money lent, the price of securities bought, commission or other source of debt. It takes its position as part of the whole debt due to the bank, and, as part of the whole debt, is in the next half-year chargeable with interest. It is no more paid than are other items of the total debt. This is the view, I think, clearly expressed by my noble and learned friend Lord Russell of Killowen, then Russell J., in *In re Jauncey* (2), where in a mortgage deed there was a provision that whenever interest was in arrear for twenty-one days it should be treated as an accretion to the capital moneys thereby secured and should thenceforth bear interest. It was contended that in those circumstances interest must be deemed to have been paid so as to affect the operation of the Real Property Limitation Acts. Lord Russell said that such a construction "would really amount to a travesty of the actual facts; because in the case of such a provision as is contained in the present deed, which enables the interest to be capitalized, the interest is not capitalized because it is in fact paid, but because it has in fact not been paid." I can add nothing to that succinct statement.

I think, therefore, that in circumstances such as the present there is no ground for holding that the interest in question was paid by Mr. Fenton; and therefore, the interesting question whether if paid it was paid out of profits and gains brought into charge does not arise. I would only add that the question does not arise in this case whether, if the debit balance including interest is paid in the next or succeeding accounts either in whole, or by a specific appropriation of a sum to the past

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(1) [1931] 2 K. B. 81.

(2) [1926] Ch. 471, 476.

H. L. (E.) interest, that is or is not a payment of interest for the purposes of the Income Tax Act. It may well be that interest is not as finally extinguished as some of the above decisions seem to suggest ; and I can see the hardships that would arise if, when the half-year's interest is only ascertained on December 31, and the whole balance is debited on January 1, the customer were debarred from income tax relief. That particular point does not arise here. For these reasons I think that the appeal should be dismissed with costs here and below.

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LORD THANKERTON. My Lords, my noble and learned friend on the Woolsack has so fully expressed my views on the matter that I cannot usefully add anything, except that I would like to add this in particular, that having had the privilege of reading the opinion about to be delivered by my noble and learned friend Lord Macmillan, I desire to express my concurrence in his analysis of the Scottish case of *Reddie v. Williamson*. (1)

LORD RUSSELL OF KILLOWEN. My Lords, I am unable to see how, upon the facts of the present case, it can be said that there was any payment by Mr. Fenton of the interest in respect of which repayment of tax is claimed under the provisions of s. 36, sub-s. 1, of the Income Tax Act, 1918. The Court of Appeal, being bound by the authority of *Holder's* case (2), necessarily held that Mr. Fenton had paid or must be deemed to have paid the interest in question. But your Lordships are not so bound.

It is not, I think, too much to say that in deciding as they did in *Holder's* case (2) the Court of Appeal were largely, if not mainly, influenced by the views which they took of the basis and effect of the decision in the Scottish case of *Reddie v. Williamson*. (1) As I understand the facts of that case, the pursuer had made himself liable as cautioner for what would be due by a customer on his current account with a bank up to a limit of 400*l.*, with interest. The account was kept with yearly rests, and when the customer died the balance last

(1) 1 Macph. 228.

(2) [1931] 2 K. B. 81.

struck showed an indebtedness of over 800*l.*, which necessarily included a considerable amount of compound interest. The defender contended that the cautioner was liable for 400*l.* and interest from the first date when the account showed a debit of 400*l.* It was held that he was only liable for 400*l.* with interest from the date of the balance last struck before the customer's death. The ground of the decision was that although the bank could have recovered interest from the cautioner at the end of each year, they had chosen not to do so, but had accumulated it with capital ; that they had thereby increased the credit given the customer in exactly the same way as if they had taken from the customer a cheque in payment of the interest due and had debited his account with the amount thereof ; that if the full 400*l.* had been previously drawn out, every such cheque for interest would have been an unauthorized overdraft for which the cautioner could not have been made liable ; and that it made no difference that without the drawing of a cheque the same amount was treated as a principal sum drawn out, and debited to the account.

My Lords, I think that, rightly considered, that decision does not rest on the view that the interest was paid in fact or was deemed to be paid, but on the view that the liability of the cautioner could not be increased by treating the customer as a debtor for a principal sum in respect of interest which he had not paid.

It is not an authority which would justify us in holding that the requirements of s. 36, sub-s. 1, are complied with where, as here, all that has happened is that, because the interest has not in fact been paid, the creditor has added the amount of the unpaid interest to the debtor's principal indebtedness. In my opinion interest which is so dealt with cannot be interest "paid to the bank," still less can it be interest "paid to the bank without deduction of tax out of profits or gains brought "into charge " within the meaning of that section.

I would dismiss the appeal.

LORD MACMILLAN. My Lords, two questions were argued on this appeal—first, whether certain interest on loans to

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Mr. Fenton by his bankers was "paid " by him within the meaning of s. 36, sub-s. 1, of the Income Tax Act, 1918 ; and second, whether the interest, if paid, was paid "out of profits or gains "brought into charge to tax " within the meaning of the same enactment.

The Special Commissioners before whom the matter came in the first instance, without deciding whether the interest in question had in fact been paid, held that, even if it had been paid, "it was not paid out of profits and gains charged to income "tax but had been paid out of further advances from the bank "in question." On a case stated, Finlay J. and the Court of Appeal, in view of the previous decision of the Court of Appeal in *Inland Revenue Commissioners v. Holder* (1), regarded themselves as bound to hold that the interest in question had been paid or must be deemed to have been paid within the statutory meaning. Dealing with the second question, Finlay J. held that the interest which he assumed to have been paid had not been paid out of profits or gains brought into charge to tax. So did the majority of the Court of Appeal (Lord Wright M.R. and Romer L.J. ; Greene L.J. dissenting). The decision of the Special Commissioners has thus so far been upheld.

The judgment of the Court of Appeal in *Holder's* case (1) is not binding on your Lordships, for although the case came on appeal to this House and the judgment below was affirmed (2) it was here decided on a different point and the question of the soundness of the view taken by the Court of Appeal as to what constituted payment within the meaning of the statute was expressly reserved by your Lordships.

The appellant, who is the trustee of the estate of Mr. Fenton under two deeds of arrangement, thus comes to this House with a decision in his favour on the first question and a decision against him on the second question. The Crown, as it is entitled to do, challenges the soundness of the decision on the first question, and thus in effect brings under review the principle of the decision of the Court of Appeal in *Holder's* case. (1) If the Crown succeeds in establishing that the interest in question

(1) [1931] 2 K. B. 81.

(2) [1932] A. C. 624.

was not "paid" within the statutory meaning, it will be unnecessary to proceed to consider the second question, for, if the interest was not paid at all, the question whether it was paid out of profits or gains brought into charge to tax does not arise.

The facts of the case are simple. Mr. Fenton at all material times had loan accounts with the National Bank, Ltd., and the Halifax Commercial Banking Company, Ltd. (subsequently the Bank of Liverpool and Martins, Ltd.), on which he had drawn large sums. The practice of the banks was to debit Mr. Fenton's accounts at the close of each half-year with the interest accrued and to carry the balance forward to the next half-year. As the balance carried forward included the amount of the interest accrued in the preceding half-year the result was that the interest debited at the end of the next half-year included interest on the interest accrued in the preceding half-year. In effect by thus adding interest to principal half-yearly the banks charged Mr. Fenton with compound interest.

No question arises with regard to Mr. Fenton's loan account with the National Bank, Ltd., as to which the Commissioners state that "the whole of the interest was paid and eventually "the account was in credit." As regards the loan accounts with the Halifax Commercial Banking Company, Ltd., in each of the calendar years 1920 and 1921 when interest fell due half-yearly on June 30 and December 31, Mr. Fenton did not make any payment to the bank, and the bank at the end of each half-year simply debited the accounts with the accrued interest and carried the balance forward, charging interest at the end of the succeeding half-year on the accumulated principal and interest and so on.

Sect. 36, sub-s. 1, of the Income Tax Act, 1918, upon which the present controversy arises, provides as follows: "36.—“(1.) Where interest payable in the United Kingdom on an "advance from a bank carrying on a bona fide banking business "in the United Kingdom is paid to the bank without deduction "of tax out of profits or gains brought into charge to tax, the "person by whom the interest is paid shall be entitled, on proof "of the facts to the satisfaction of the special commissioners,

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For each of the tax years to April 5, 1921, and April 5, 1922, Mr. Fenton claimed that the action of the bank in debiting with his consent to his loan accounts half-yearly the accrued interest and carrying forward the accumulated sum constituted, as between him and the bank, payment at each half-yearly period of the interest then falling due. He accordingly maintained that in the tax year to April 5, 1921, he had in this way paid 27,076*l.* 10*s.* 10*d.* of interest to the bank, without deduction of tax, on the bank's advances to him. As, after allowing for deductions and repayments, he paid income tax for the year to April 5, 1921, on 7777*l.*, he claimed that the sum of 27,076*l.* 10*s.* 10*d.* of interest had to the extent of 7777*l.* been paid out of profits or gains brought into charge to tax, and that he was accordingly entitled to repayment of tax on 7777*l.* under the section above quoted. He submitted similar calculations for the fiscal year to April 5, 1922, bringing out a claim for repayment for that year of tax on 2722*l.*

My Lords, it is a condition of a claim for repayment of tax on bank interest under s. 36, sub-s. 1, that the taxpayer shall have "paid" to his bank the interest in respect of which he claims repayment of tax. In my opinion this means that the taxpayer must really, and not merely notionally, have paid the interest; there must be payment such as to discharge the debt; the payment must be a fact not a fiction.

Now what justification can there be for holding that Mr. Fenton in the year to April 5, 1921, "paid" to the bank a sum of 7777*l.* in discharge pro tanto of the interest charges of 27,076*l.* 10*s.* 10*d.* which he incurred to them in that year? What happened was that Mr. Fenton did not pay the interest due by him at June 30 and December 31, 1920, and it was because he did *not* pay it that it was debited to his loan account on each half-yearly occasion and the accumulated sum carried forward to the next half-year. The effect of this method of accounting between Mr. Fenton and the bank, it is suggested, was that when the interest was debited to the loan account Mr. Fenton ceased to owe it to the bank *quæ* interest and it became transmuted into an addition to the principal loan.

The transaction at each half-year, it was said, when analysed, involved the following steps—a demand by the bank for the interest due, a request by Mr. Fenton for a further advance to enable him to pay the interest, an agreement by the bank to make this further advance, and finally the application by Mr. Fenton of this further advance to the payment of the interest, with the result that Mr. Fenton was entitled to maintain that he had “paid” the interest.

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My Lords, the origin of this agreeable fiction whereby debts are to be deemed to be paid without payment may be traced historically to the ingenuity of lenders in devising a method of obtaining compound interest without contravening the usury laws. It was illegal by an antecedent contract to stipulate for the payment of compound interest, “but if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate that you will forbear for six months upon those terms [i.e., that the interest shall carry interest for the subsequent six months] that is legal”: per Lord Chancellor Eldon in *Ex parte Bevan*. (1) On this principle it was held in *Eaton v. Bell* (2) that bankers who, with the knowledge of and without objection by their customers, debited them with interest with half-yearly rests in accordance with their general practice, did not offend against the usury laws. This method of dealing with loan accounts, which became common form among bankers, survived the abolition of the usury laws and is well established as the ordinary usage prevailing between bankers and customers who borrow from them and do not pay the interest as it accrues.

Now it may well be that as between a bank and its customer this method of dealing may have the result that the accrued interest which the bank has with the customer’s assent added to the principal loan thereby ceases to be due or recoverable as interest, but becomes merged in the principal loan. But has it been “paid”? In *Holder’s* case (3) the Court of Appeal in holding that on this method of accounting the customer (in the words of Romer L.J. (4)) “must be deemed to have paid

(1) 9 Ves. 223, 224.

(2) 5 B. & Ald. 34.

(3) [1931] 2 K. B. 81.

(4) *Ibid.* 100.

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“each half-year the accruing interest by means of an advance “made for that purpose by the bank ” to the customer, were largely influenced by the views expressed by Lord President (then Lord Justice-Clerk) Inglis and Lord Cowan in the Scottish case of *Reddie v. Williamson*. (1) The pursuer in that case was a party as cautioner to a cash credit bond whereby the British Linen Bank agreed to allow the pursuer’s son credit upon current account to the amount of 400*l.*, and the pursuer bound himself to pay up to that amount whatever should be due upon the account when demanded, with the due and lawful interest of the same from the time of advance until repayment. The principal debtor died insolvent and at the last balance on May 30, 1849, before his death the account was in debit to an amount exceeding 800*l.*, composed to a large extent of compound interest calculated with annual rests according to what was described as “the invariable practice of bankers.” The defender was the agent of the British Linen Bank at Kinross and the pursuer in the action sued him for an accounting as his factor or agent, complaining (inter alia) that he had paid to the bank out of his funds in settlement of his liability under the cash credit bond more than was legally due. The defender’s contention was that the sum found due at the last balance before the death of the principal debtor was composed partly of principal and partly of interest and that the pursuer was liable to the bank for “400*l.* of principal and in addition “for all the interest that may have accrued on that sum for “however long a period and though the whole of it has from “time to time been added to and accumulated with principal.” The Court held that the utmost extent of the pursuer’s liability was for “400*l.* of principal with interest thereon from May 30, “1849, all previous claim for interest having been extinguished “by its being converted into principal.”

My Lords, I think it is important to have in mind the nature of the action, as I have described it, in reading the language employed by the Lord Justice-Clerk and Lord Cowan to which so much weight was given by the Court of Appeal in *Holder’s*

(1) 1 Macph. 228.

case. (1) The question was whether the debit items of accrued interest which, according to the practice of the bank, had been debited to the account at the end of each year, and on which interest was thereafter charged, were capital debits attributable to the 400*l.*, or retained their character of interest. There was no suggestion that the debits had been discharged by payment. The question was one of construction of the cash credit bond, to which the cautioner was a party, and it was held that the parties must have had in view that the account would be kept according to the invariable practice of bankers. It is true that in explaining that practice, the Lord Justice-Clerk said that the method pursued by the bank of accumulating the interest with the capital annually was the same "as if the leading obligant, "instead of paying the interest otherwise at the end of the year, "had given the bank a cheque for the amount on the cash "credit account, with which the bank extinguished the interest "and then placed the amount of the cheque to the debit of the "cash account as an ordinary draft," but he added later, "the privilege of a banker to balance the account at the end of "the year, and accumulate the interest with the principal, is "founded on this plain ground of equity, that the interest "ought then to be paid, and, because it is not paid, the debtor "becomes thenceforth debtor in the amount, as a principal sum "itself bearing interest." Lord Cowan said—in less precise language—"By being carried into the account each year, and "converted into principal, the interest was paid to the bank, "and could not afterwards be revived as interest to suit their "convenience or profit." It may well be that in a question between a bank and its customer, and equally between a bank and its customer's cautioner, the interest accruing annually may by the sanctioned method of accounting cease to be interest when it is accumulated with the principal, so that the bank can thereafter no longer sue for the interest as interest. Your Lordships have not had the advantage of hearing the views of any representative of banking interests, and I should not wish anything that I say now to be taken as affecting any questions which may arise as between banks and their customers. But

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it is manifest that it is only by a legal fiction that the interest in such cases as the present can be said to have been paid. After, as before, the striking of the balance, the same sum remains due, no longer, it may be, as interest, but still due as part of the principal debt. In construing the extent of the cautioner's liability under the cash credit bond the Court would appear to have been well founded in their view that the bank's own method of accounting assented to by the principal debtor and recognized as ordinary practice precluded any claim for past interest as interest prior to the last balance. The cautioner was liable for whatever was drawn upon the cash credit account up to 400*l.* and the unpaid interest was debited in account just like the ordinary drafts upon it and became part of the principal debtor's capital indebtedness for which the cautioner was liable up to 400*l.* with interest subsequent to the last balance.

But it is quite a different matter when the question is whether the interest in such a case has been "paid" within the meaning of s. 36 of the Income Tax Act. In my opinion the phrases I have quoted from the Lord Justice-Clerk and Lord Cowan were used in an entirely different context, and to apply them to the present question would be to misapply them. As I have already said, what the Income Tax Act requires as the condition of repayment of tax on interest is that the sum due as interest shall have been actually discharged, not merely constructively paid. To warrant repayment of tax there must have been a real payment of tax and a real payment of interest without deduction of tax.

It is right to notice the point on which Greene L. J. laid stress in his judgment—namely, that the purpose of s. 36 is presumably to avoid the double exaction of tax. I take it to be the case that a bank in making up its return of profits or gains brings into account the accrued interest on its loan accounts, whether paid or unpaid and accumulated, with the result that the unpaid and accumulated interest becomes a factor in computing the balance of its profits or gains on which, if a credit balance is shown, tax is paid. Indeed it is by the proviso to s. 36 a condition of repayment of tax on interest that the interest be

brought into account in the recipient's income tax return, and in the present case we were asked to assume that this had been done. But the fact that the banks treat the accrued and accumulated interest in this fashion as an item of income in their income tax accounts does not, in my opinion, necessarily lead to the view that the customer has paid this interest within the statutory meaning. At worst, the result may be that s. 36 affords only an imperfect remedy against double taxation. Indeed the relief given in the matter of tax on interest by s. 36 is conferred only in the case of interest paid to certain specified types of lenders, and there are of course many instances where money which A. pays out of his taxed income to B. is charged again with income tax in the hands of B.

The mischief of double taxation occurs where the same income is twice charged with tax. Where a person pays his current obligations out of his income, the money paid in the general case becomes the income in turn of the recipient and the incomes of the payer and the payee may both be taxed without double taxation in the proper sense. Sect. 36 in giving relief in certain cases of payment of interest qualifies this general principle in these instances, and various explanations, none of them entirely satisfactory, have been suggested as to the principle on which the relief is given. One suggestion has been that the bank customer in paying interest to the bank is sharing or distributing one income as between himself and the bank, and that accordingly one income should bear only one tax. I do not find this convincing. But whatever may be the justification for treating the payment of interest in certain cases in this special fashion, it may well be, as so often happens in income tax legislation, that what has been enacted does not completely achieve what was intended. At any rate I am satisfied that s. 36, sub-s. 1, does not cover the present case, whether it truly involves double taxation in the strict sense or not.

My Lords, if your Lordships are in agreement with me, it becomes unnecessary to consider the second question, and your Lordships are once more deprived of an opportunity of considering the true meaning of payment "out of profits or "gains brought into charge" in relation to the case of

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H. L. (E.) *Attorney-General v. Metropolitan Water Board* (1), on which
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 topic the learned judges of the Court of Appeal have said much
 that is interesting and important.

I concur in the motion that the appeal be dismissed with costs.

LORD MAUGHAM. My Lords, it is unnecessary to repeat the circumstances in which this appeal comes before your Lordships, since they have been amply stated ; and, indeed, but for the fact that we have been invited to overrule one of the grounds for the decision of the Court of Appeal, namely, the case of *Inland Revenue Commissioners v. Holder* (2), I should have added nothing to the opinions of my noble and learned friends Lord Atkin, Lord Russell of Killowen, and Lord Macmillan.

In *Holder's* case (2), as in the present one, the question arose whether a taxpayer was entitled to repayment of tax under s. 36, sub-s. 1, of the Income Tax Act, 1918, which is in the following terms : “ 36.—(1.) Where interest payable in the “United Kingdom on an advance from a bank carrying on a “bona fide banking business in the United Kingdom is paid “to the bank without deduction of tax out of profits or gains “brought into charge to tax, the person by whom the interest “is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on “the amount of the interest.”

The second sub-section provides for similar relief “on the “like proof” in the case of advances from a person “bona “fide carrying on business as a member of a stock exchange “in the United Kingdom,” or a person “bona fide carrying “on the business of a discount house in the United Kingdom.” The first sub-section corresponds with the Finance Act, 1915, s. 22 ; the second sub-section with the Finance Act, 1917, s. 25. It will be remembered that the well known and ancient rule, now r. 21 of the All Schedule Rules, applies to “payment “of any interest of money, annuity or other annual payment “charged with tax, etc.” It provided that the interest-payer should deduct the amount of the tax and account for the same

(1) [1928] 1 K. B. 833.

(2) [1931] 2 K. B. 81.

to the Commissioners. There was originally no such right in the case of short loans (including overdrafts) from banks ; in such cases interest had to be paid without deduction. The right to recoupment was not given by the Legislature till 1915, and, it is said, was then conferred in order to facilitate during the War the raising of money on short loan from banks for the purpose of subscribing to Government issues.

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Under s. 36 the interest must be (1.) paid to the bank without deduction of tax, and (2.) so paid out of profits or gains brought into charge to tax. The bank's customer is then to be entitled, on proof of the facts to the satisfaction of the Special Commissioners, to repayment of tax on the amount of the interest.

In *Holder's* case (1), as in the present, nothing was actually paid by the customer in respect of the relevant advance or advances either for principal or interest. In accordance with the usual practice of bankers in this country, the system adopted by the bank was that each half-year the accrued interest was added to the amount advanced (including therein any interest previously added to the original amount) and the total sum was carried forward into the next half-year as one capitalized sum. This is a mere matter of entries in the books of the bank, and the result is to give the bank compound interest on the amount due. According to the authorities the customer could object, but at the risk of being called upon to pay the amount due from him. It is not quite clear that his acquiescence in the account being kept on such a basis can be inferred simply from his receipt of a single pass-book or other account and his return of it without comment. Something may turn upon the other circumstances of the case and acquiescence might doubtless be inferred from a course of business : see *Bank of England v. Vagliano Brothers*. (2) The question, however, arises, assuming the entries in the bank books to have been made with the assent of the customer, has he paid the interest each half-year to the bank ?

In *Holder's* case (1) the Court of Appeal, relying on several cases which were dealing with the position as between the

(1) [1931] 2 K. B. 81.

(2) [1891] A. C. 107, 116, 128.

H. L. (E.) bank and the customer, held that the latter must be deemed
 1938 to have paid the accruing interest half-yearly to the bank
 PATON by means of advances made for that purpose by the bank
 v. to the customer. Those cases have been carefully considered
 INLAND by your Lordships, and I shall serve no useful purpose by a
 REVENUE further criticism or explanation of them. In particular I
 COMMISSIONERS. agree that there is nothing in the cases which can lead us to
 Lord Maugham. the conclusion that the customer has paid the interest in
 the circumstances we are considering.

I venture to add some reasons on the construction of the section which have led me to the conclusion that something more than book entries made by the bank would be required to satisfy the section.

In the first place, I would observe that the Legislature must be taken in 1915 to have been fully conversant with the usual practice of banks in the United Kingdom in relation to short loans and overdrafts. Unless that practice were departed from there would always be a payment of interest by the customer, that is, either an actual payment or an apparent payment by an entry in the account. Yet the section takes care to provide that the facts must be proved to the satisfaction of the Special Commissioners. The second sub-section requires "the like proof" of payment in the case of members of a stock exchange in the United Kingdom; yet it would seem reasonable to suppose that in such a case actual payment is required.

Next, it is difficult to see why payment of interest by the customer is required as a condition precedent to his right to repayment of tax unless the payment has actually been made in some shape or form. The requirement seems to have been borrowed and adapted from r. 21, or rather from its earlier form in s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888. The Legislature may well have thought that if the customer never in fact paid the interest, e.g., if he became wholly insolvent, he ought not to have a claim to repayment of tax on the interest even if the interest were to be brought into account by the bank in the statement delivered to the Commissioners. If the practice of bankers

is to be sufficient to prove a payment, I cannot understand why s. 22 of the Finance Act, 1915, was framed as it was.

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Finally, it is to be noted that the payment is expressed to be "out of profits or gains brought into charge to tax." Without attempting to explain this somewhat cryptic phrase, it is I think reasonably clear that it imports such a payment by an exercise of volition on the part of the payer, and that it points in the direction of something more than could be established by the presumption of an advance by the bank applied nolens volens so far as the customer is concerned in discharge of accrued interest due by him.

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My Lords, these reasons, as well as those stated by my noble and learned friends, which I will not stay to repeat, have led me to the conclusion that *Holder's* case (1) cannot be supported so far as it decided that the customer must be taken to have paid the interest on the advance due by him by means of further periodical advances made for that purpose. If this is correct it must follow that the present appeal must fail, since one of the conditions on which the taxpayer is entitled to repayment of tax, namely, payment of interest to the bank, has not been satisfied. I therefore concur in the proposed motion.

Appeal dismissed.

Solicitors for appellant: *Blundell, Baker & Co., for Mumfords & Gordons, Bradford.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1931] 2 K. B. 81.

[HOUSE OF LORDS.]

H. L. (E.)* HUGHES APPELLANT ;

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AND

Jan. 28, 31 ; BANK OF NEW ZEALAND RESPONDENTS.

Feb. 1 ;

March 4.

Revenue—Income tax—Exemption—Interest on War Loan and Colonial Securities—Interest received by London branch of Colonial bank—Bank ordinarily resident in New Zealand—Trading expenses—Apportionability—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 46—General Rules under Sch. C, r. 2 (d)—Sch. D, Miscellaneous Rules, r. 7, sub-r. 2.

The Bank of New Zealand, which was registered and resident in New Zealand, carried on banking business at a branch office in London. It was assessed to income tax on the profits arising from its trade exercised in London under Case I. of Sch. D of the Income Tax Act, 1918, for the financial year 1928–29 in the sum of 94,448*l.* It possessed, as part of the assets of its London branch, holdings of 5 per cent. War Loan, India Government 3 per cent. stock, and securities of the Grand Trunk Pacific Railway and the Auckland Electric Power Board, purchased out of the floating capital of the London branch, and other moneys obtained in New Zealand, to borrow which it had expended 41,262*l.* The interest on the War Loan and other stocks amounted to 78,556*l.* for the period in question :—

Held, that this sum of 78,556*l.* was altogether exempt from income tax, the War Loan under s. 46 of the Income Tax Act, 1918, the interest on the India Government Stock under r. 2 (d) of the General Rules applicable to Sch. C, and the interest on the other securities under r. 7 of the Miscellaneous Rules under Sch. D, and did not become taxable by being included in trading profits assessable under Case I. of Sch. D.

Held, further, that the bank was entitled for the purposes of assessment to deduct from its profits its proper trading expenses, including therein the sum of 41,262*l.*, being the expenses particularly attributable to the earning of the said sum of 78,556*l.* of interest, notwithstanding that the latter sum was immune from taxation.

Decision of the Court of Appeal [1937] 1 K. B. 419 affirmed.

APPEAL from a decision of the Court of Appeal (1).

The Bank of New Zealand appealed against an assessment

(1) [1937] 1 K. B. 419.

* *Present* : LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD MAUGHAM.

to income tax in the sum of 94,448*l.* for the year ending April 5, 1929, made by the Additional Commissioners of Income Tax for the City of London under Case I. of Sch. D of the Act of 1918, in respect of the trade carried on by the Bank in the United Kingdom. The Bank had its head office in New Zealand, and a branch office in London, and it was admitted that it was ordinarily resident in New Zealand and not in the United Kingdom. The assets held by the London branch included a large holding of 5 per cent. War Loan and smaller holdings of India Government 3 per cent. stock and securities of the Grand Trunk Pacific Railway and the Auckland Electric Power Board. For the year ending March 31, 1928, the Bank received 76,621*l.* interest on the War Loan and smaller sums for interest on the other securities mentioned, making a total sum of 78,556*l.*, which was included in the trading receipts of the London branch of the Bank. The dispute related to these items of interest, which the Bank claimed were altogether exempt from income tax under the Income Tax Act, 1918, s. 46, the General Rules, under Sch. C, r. 2 (*d*), and the Miscellaneous Rules under Sch. D, r. 7.

The Crown contended that these items, being part of the trading profits of the Bank in London, were properly assessed under Case I. of Sch. D, and were not therefore exempt from income tax. The accounts of the London branch of the Bank for the period in question showed a balance of profit of 116,023*l.* after charging on the debit side of the account the sum of 112,868*l.* for interest and expenses paid in New Zealand in respect of money borrowed there and remitted to London and there used in the purchase of the War Loan and other securities mentioned. The Crown was prepared to admit that this sum of 112,868*l.* was an allowable deduction for expenditure, if the above-mentioned securities were included in the computation of the liability of the Bank under Sch. D, and contended that the assessment should be amended to the sum of 116,023*l.* The Crown, however, contended, in the alternative, that if the above-mentioned items of interest on War Loan and other securities were

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The Special Commissioners held that all the interest on the above-mentioned sums of War Loan, India Government Stock, and stocks of the Grand Trunk Pacific Railway and the Auckland Electric Power Board must be excluded from the computation of the Bank's profits for the year under Sch. D. On the question of deduction of expenses, they held that only the actual cost incurred by the Bank in earning the trading receipts of the London branch could be set off against those receipts in arriving at the assessable profits of the Bank arising from its trade in London, and that no further deduction should be allowed on the ground that a notional profit should be attributed to the Bank's operations in New Zealand. The Commissioners accordingly reduced the assessment of the Bank to 37,467*l.*

Lawrence J. upheld the decision of the Commissioners and his decision was affirmed by the Court of Appeal.

The Crown appealed.

Sir Donald Somervell A.-G. and *Reginald Hills* for the appellant. The Court of Appeal has held that the respondents are entitled to a complete exemption from income tax in respect of the interest on all four sets of securities. We submit that that is wrong. First of all it has to be borne in mind that the primary object of a bank is to earn profits for its shareholders, and, unless a clear exemption from income tax can be pointed to, those profits are liable to tax just as they would be if earned by any individual. The question therefore is, can the respondents bring themselves within any of the exempting provisions of the Income Tax Act, 1918. With regard to the interest on the War Loan it may

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have to be conceded that it is exempted by s. 46 of the Act, but, if that is so, the expense incurred by the Bank in connection with the investment and thus earning the interest must be excluded from the other side of the account, otherwise the respondents will be given a double exemption for which there is no authority or justification to be found in the Act. With regard to the interest on the India Government stock for which exemption is claimed under Rule 2 (d) of the General Rules applicable to Sch. C of the Act of 1918, we contend that that Rule applies only to tax coming within Sch. C, and has no application to ordinary trade profits following within Case I. of Sch. D. As to the dividends derived from the Grand Trunk Pacific Railway and the Auckland Electric Power Board, no specific exemption can be pointed to. Rule 7, sub-r. 2, of the Miscellaneous Rules applicable to Sch. D, which provides that "All the provisions of Schedule C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person (other than the National Debt Commissioners or the Bank of England or the Bank of Ireland) for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under this rule," does not use language apt to include every provision of Sch. C, and should not be construed as exempting the dividends in question. They referred to *Scottish Mortgage & Land Investment Co. of New Mexico v. Inland Revenue Commissioners* (1); *Liverpool & London & Globe Insurance Co. v. Bennett* (2); *Singer v. Williams*. (3)

Latter K.C. and *J. S. Scrimgeour* for the respondents were not called upon as to the interest on the War Loan.

With regard to the interest on the other securities a similar complete exemption from tax has been given. The dividends on the India Government stock in the hands of the respondents come within the exact words of Rule 2 (d) of the Rules applicable to Sch. C which provides that "No tax shall be chargeable

(1) (1886) 14 R. 98.

(3) [1921] 1 A. C. 41.

(2) [1913] A. C. 610.

H. L. (E.) “in respect of—. . . (d) The interest or dividends on any
 1938 “securities of a foreign State or a British possession which
 HUGHES “are payable in the United Kingdom, where it is proved to
 v. “the satisfaction of the Commissioners of Inland Revenue
 BANK OF “that the person owning the securities and entitled to the
 NEW “interest or dividends is not resident in the United
 ZEALAND. “Kingdom. . . .” There is no ground for saying that those
 words are to be read in any limited sense ; they are of general
 application. With regard to the other sources of income
 in question—namely, the dividends of the Grand Trunk
 Railway and the Auckland Electric Power Board, exemption
 is clearly given by Rule 7, sub-r. 2, of the Miscellaneous Rules
 applicable to Sch. D. That Rule incorporates all the
 provisions of Sch. C, including those granting exemption
 from tax. With reference to the contention of the Attorney-
 General that, if the respondents are entitled to the exemptions
 they claim, the expenses of earning the interest must be
 excluded also, we submit that, as those expenses were wholly
 and exclusively laid out for the purposes of the respondents’
 trading, they were properly deductible.

Sir Donald Somervell A.-G. replied.

The House took time for consideration.

1938. March 4. LORD ATKIN. My Lords, in this case I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend, Lord Thankerton. I agree with it, and find it unnecessary to add anything.

LORD THANKERTON. My Lords, the respondent Bank, which admittedly resides in New Zealand and is not resident or ordinarily resident in the United Kingdom, has a branch office in London. It is admittedly assessable to income tax under Case I. of Sch. D of the Income Tax Act, 1918, on the profits arising from the trade exercised at the London branch, and the present appeal relates to an assessment to income tax in the sum of 94,448*l.* for the year ending April 5, 1929,

made upon it by the Additional Commissioners of Income Tax for the City of London under Case I., in respect of these profits.

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The following statement shows, in summary form, the material receipts and expenses of the London branch for the year ending March 31, 1928, upon which the assessment was based, as adjusted for income tax purposes by the Additional Commissioners :—

<i>Dr.</i>	£		<i>Cr.</i>	£
Working Expenses	41,070	Exchange and Commis- sion (mainly profit on Exporters' Bills pur- chased)	90,600	
Interest paid on deposits and balances in Lon- don	19,312	Loans to Banks and Discount Houses	37,209	
Rebates on bills receiv- able which were im- mature on 31st March, 1928	7,814	Interest on overdrawn accounts	25,558	
Commission and Ex- change	36,482	Interest on dishonoured bills	2,122	
Interest and expenses paid in New Zealand in respect of money borrowed in New Zea- land, and used at the London Branch	112,868	Discounts on Treasury Bills	68,037	
(Note.— This item includes 41,262 <i>l.</i> in respect of money borrowed in New Zealand and used in the purchase of the following assets of the London Branch :—		Interest on War Loan 3½ per cent.	6,043	
War Loan 5 per cent.		Interest on War Loan 5 per cent.	75,621	
India 3 per cent.		Interest on India 3 per cent.	1,500	
Grand Trunk Pacific Railway.		Interest on Grand Trunk Pacific Rail- way	412	
Auckland Electric Power Board.)		Interest on Auckland Electric Power Board	1,023	
Profit on sale of securi- ties		Profit on sale of securi- ties	10,714	
Balance, Profit	116,023	Exchange Adjustment	14,730	
	<u>£333,569</u>		<u>£333,569</u>	

The respondent Bank appealed against the assessment, and maintained that, under certain statutory exemptions, the

H. L. (E.) following four credit items should be excluded from the account :—

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HUGHES	1. Interest on War Loan 5 per cent.	75,621
v.	2. Interest on India 3 per cent.	1,500
BANK OF	3. Interest on Grand Trunk Pacific Railway ..	412
NEW	4. Interest on Auckland Electric Power Board ..	1,023
ZEALAND.		
Lord		<u>£78,556</u>
Thankerton.		

The Crown disputed the respondents' contentions, but maintained that, if these items, or any of them, fell to be excluded, the proportion of the debit item of 112,868*l.* for interest and expenses which was attributable to the cost of obtaining the money used in earning the item or items so excluded, should also be excluded, so that only the net profit derived should be excluded from the trading account. As stated above, the proportion attributable to the four credit items sought to be excluded is 41,262*l.*, which consists of the cost of obtaining from New Zealand the money used in these four securities, so far as it is not part of the Bank's capital, and takes into account not only the average rate of interest paid on deposits in New Zealand, and the cost of issuing notes there, but also an appropriate proportion of the general expenses incurred by the Bank there.

The Special Commissioners upheld the respondents' contentions and excluded the four credit items from the account, and rejected the appellant's contention, on that footing, for exclusion of the debit item of 112,868*l.* to the extent of 41,262*l.* In accordance with this decision the assessable profit was reduced from 116,023*l.* by the amount of the four credit items (78,556*l.*), to 37,467*l.* On appeal to the King's Bench Division, Lawrence J. affirmed the determination of the Special Commissioners, and his judgment was affirmed, on appeal, by the Court of Appeal, against whose judgment the present appeal is taken.

The statutory provisions on which the respondents base their claim for the exclusion of the items are as follows :—

1. As regards the War Loan interest, s. 46 of the Income Tax Act of 1918, which provides: " 46. (1.) Where the

"Treasury have before the commencement of this Act issued
 "or may thereafter issue any securities which they have
 "power to issue for the purpose of raising any money or any
 "loan, with a condition that the interest thereon shall not be
 "liable to tax or super-tax, so long as it is shown, in manner
 "directed by the Treasury, that the securities are in the
 "beneficial ownership of persons who are not ordinarily
 "resident in the United Kingdom, the interest of securities
 "issued with such a condition shall be exempt accordingly."

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2. As regards the India Government Stock, Rule 2 (d) of the General Rules applicable to Sch. C, which provides:
 "2. No tax shall be chargeable in respect of—(d) The interest
 "or dividends on any securities of a foreign State or a British
 "possession which are payable in the United Kingdom, where
 "it is proved to the satisfaction of the Commissioners of
 "Inland Revenue that the person owning the securities and
 "entitled to the interest or dividends is not resident in the
 "United Kingdom; but, save as provided by this Act, no
 "allowance shall be given or repayment be made in respect
 "of the tax on the interest or dividends on the securities of
 "any foreign State or any British possession which are payable
 "in the United Kingdom. . . ."

3. As regards the Grand Trunk Pacific and Auckland Electric Power stocks, the respondents contend that Rule 2 (d) of Sch. C was made applicable to the interest on these stocks by Rule 7, sub-r. 2, of the Miscellaneous Rules of Sch. D, which provides as follows: "7.—(1.) Where—(a) any interest . . . payable out of or in respect of the stocks, funds, shares or securities of any foreign or colonial company . . . are intrusted to any person in the United Kingdom for payment to any persons in the United Kingdom, the same shall be assessed and charged to tax under this Schedule by the special commissioners. (2.) All the provisions of Schedule C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person . . . for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under this rule."

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As regards the War Loan, the Crown did not maintain their appeal. In this I think that the Crown were well advised, for I agree with the learned Master of the Rolls that their contention is contrary to the apparent meaning of the statutory provisions, originally contained in s. 47 of the Finance (No. 2) Act, 1915, and would involve the very serious frustration of what the parties, taking the securities from time to time, might be assumed to have contemplated. But it is necessary to notice here an argument which the Crown put forward as applicable to all the four credit items in dispute—namely, that the provisions of s. 46, sub-s. 1, of the Income Tax Act, and Rule 2 (*d*) of the General Rules applicable to Sch. C merely exempted certain interest paid to persons not resident or not ordinarily resident in the United Kingdom from charge under Sch. C, or Case III. of Sch. D, *qua* interest, and did not operate to exclude any trading receipts of a trade exercised in the United Kingdom from the computation of the profits of the trade for the purposes of assessment under Case I. of Sch. D. This appears to have been the only argument submitted by the Crown as to the War Loan, but, despite their abandonment of it as regards the War Loan, they still maintained it as regards the remaining items before your Lordships.

My Lords, I have no difficulty in rejecting this contention ; I agree with the Courts below that whether as interest or as a component part of the profits of a trade, the exemptions must equally apply.

The only question remaining as to the India Government Stock is whether Rule 2 (*d*) of the General Rules of Sch. C refers only to tax under Sch. C or is of general application. In my opinion it is clearly not limited to Sch. C in its operation. The opening words of the Rule do not limit it to no tax “ under “ this Schedule,” as is done both in Rule 1 and Rule 3, and it can hardly have been the intention to limit the exemption of the stock, dividends or interest of an accredited Minister of any foreign State under head (*c*) of Rule 2 ; equally there seems to be no reason in so limiting head (*d*). But, further, Rule 2 (*d*) is a consolidation of the exemption conferred by s. 71, sub-s. 2,

of the Finance Act of 1910, which was not limited to any particular schedule. H. L. (E.)

A more difficult question arises as to the Grand Trunk Pacific and Auckland Electric Power Stocks—namely, as to the extent of the incorporation of the provisions of Sch. C by Rule 7, sub-r. 2, of the Miscellaneous Rules of Sch. D, in view of the words, “relating to the tax to be assessed “and charged in respect of dividends payable out of any “public revenue other than that of the United Kingdom, “and intrusted to any person (other than the National Debt “Commissioners or the Bank of England or the Bank of “Ireland) for payment to any persons in the United “Kingdom.”

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The Crown maintain that the small group of nine Rules under Sch. C, which are entitled “Rules as to interest, etc., “with the payment of which persons other than the Bank “of England, the Bank of Ireland, and the National Debt “Commissioners are intrusted,” are alone incorporated by Rule 7, sub-r. 2. That group of Rules relates to the payment of dividends payable out of the public revenue of Northern Ireland or which are payable to any persons in the United Kingdom out of any public revenue other than that of the United Kingdom or of Northern Ireland. It is to be noticed that by Rule 9 of these Rules the expression “dividends” is defined as including interest, annuities, dividends, and shares of annuities, and that in the eight preceding Rules the word “dividends” is alone used. That group of Rules is properly described as providing mere machinery. The respondents maintain that the language of Rule 7, sub-r. 2, is apt to include every provision of Sch. C which, *mutatis mutandis*, is applicable to the dividends described in Rule 7, sub-r. 2, and that among such provisions General Rule 2 (*d*) of Sch. C necessarily has a place.

My Lords, I feel the greatest difficulty in coming to any clear conclusion on the matter; I find the language of the sub-section of Rule 7 evasive and ambiguous; a slight alteration of the words could have clearly expressed either of the opposing constructions.

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In the first place, I agree with the Court of Appeal in their acceptance of the argument of the Crown that s. 71, sub-s. 2, of the Finance Act of 1910, did not confer the exemption here claimed, and in their rejection of Mr. Latter's contention to the contrary. It follows that this exemption, if the respondents are right in their construction, is conferred for the first time by the Consolidation Act. The presumption against such a construction is rightly recognized by the Court of Appeal, but they held that the language of the sub-section is sufficiently clear to overcome the presumption. They felt fortified in this view by the provisions of s. 27 of the Finance Act of 1924, to which I will refer later.

The Crown's main contention is that Rule 7 is not a charging rule, but merely provides machinery for collection of tax, and that it would be out of place to find an exemption from tax in the Rule. They claim, with some force, that the terminology of sub-section 2 of the Rule substantially reproduces the heading of the small group of rules of Sch. C above referred to, noting incidentally that dividends are alone referred to, and that it is only in the small group that dividends are alone referred to, coupled with a definition clause.

The Court of Appeal held that Rule 7, sub-r. 1 was a charging provision, and that the opening words of Rule 7, sub-r. 2—"All the provisions of Schedule C relating to the tax to be "assessed and charged"—were general and clearly included the General Rules *mutatis mutandis*. On the first point, I find it sufficient to say that, in my opinion, rules which are described as miscellaneous, and which contain, for instance, in Rule 2 an undoubted exemption, afford a not inappropriate place for the grant of exemptions. But it is on the wording of Rule 7, sub-r. 2 that I feel doubt, for the words following the opening words quoted above have some resemblance to the heading of the small group of rules of Sch. C, taken along with the subject-matter of the group, as defined in Rule 1 of the group. But the ambiguous nature of these words, so far as bearing on the point at issue, does not enable me to differ from the firm opinion of all three members of the Court of Appeal.

But, as already stated, the Court of Appeal, and in particular, the Master of the Rolls and Greene L.J., found confirmation for their view of Rule 7 in the provisions of s. 27 of the Act of 1924, which provides a right of appeal from "the decision of "the Inland Revenue Commissioners" in certain specified cases. Sect. 41 of that Act provides that Part II., which includes s. 27, is to be construed together with the Income Tax Acts. Among the cases specified, the material provision is as follows: "(3.) This section applies to the following "questions:—(c) any question as to residence arising— "(i.) under paragraph (d) of Rule 2 of the General Rules "applicable to Schedule C; or (ii.) under Rule 7 of the "Miscellaneous Rules applicable to Schedule D in connection "with a claim for repayment of income tax made to the "Commissioners of Inland Revenue by the person owning "the stocks, funds, shares or securities and entitled to the "income arising therefrom, or entitled to the annuities, "pensions or other annual sums, as the case may be, and from "whose income a deduction has been made on account of the "income tax assessed and charged under the said Rule."

The learned Master of the Rolls holds that head (ii.) of sub-s. 3 (c) treats Rule 7 as containing a provision in the terms set out, and holds that the terms set out are the exact terms to be found in General Rule 2 (d) of Sch. C, and that accordingly they can only be found in Rule 7 of the Miscellaneous Rules under Sch. D if Rule 7, sub-r. 2 has incorporated them, which is the conclusion at which he had already arrived. Greene L.J. expresses the same view, and also lays stress on the use of the word "decision," on the ground that that could only refer to a power of decision expressly conferred on the Commissioners of Inland Revenue. I find myself unable to agree with this latter view; in my opinion, it may well refer to a refusal to concede the claim of the aggrieved person, which, prior to the Act, would have involved a petition of right—a procedure which the provision was apparently designed to obviate. On the first point expressed by the learned judges I do not feel so clear as to utilize this ex post facto legislation in the construction of the Act of 1918, but, again, I am not

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H. L. (E.) prepared to reverse, on appeal, the clear decision of the Court of Appeal. If the policy of the Crown is otherwise, it is for them to rectify the ambiguities by amending legislation.

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I am therefore of opinion that the appeal of the Crown fails on all the main questions.

There remains the alternative question as to reduction of the amount of the four credit items so to be excluded from the computation by a proportionate part of the debit item of 112,868*l.*, which has been agreed at 41,262*l.* It is perhaps enough to say that the Crown are unable to point to any statutory provision in support of their contention, whereas the respondents find full justification for their resistance in the provisions of Rule 3 of the rules applicable to Cases I. and II. of Sch. D, which is as follows: "3. In computing the "amount of the profits or gains to be charged, no sum shall "be deducted in respect of—(a) any disbursements or expenses, "not being money wholly and exclusively laid out or expended "for the purposes of the trade, profession, employment or "vocation."

In order to ascertain the authorized deductions, it is right to turn this into positive form. In this view, it seems to me to be incontrovertible that, in the present case, the investments in question were part of the business of the respondents' trade, and that the expense connected with them was wholly or exclusively laid out for the purposes of the trade. Expenditure in course of the trade which is unremunerative is none the less a proper deduction, if wholly and exclusively made for the purposes of the trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense. I agree on this question with the decision of the Courts below.

I am of opinion, accordingly, that the decision of the Court of Appeal should be affirmed, and the appeal should be dismissed with costs.

LORD RUSSELL OF KILLOWEN. My Lords, I agree.

LORD MACMILLAN. My Lords, I also agree.

LORD MAUGHAM. My Lords, I concur.

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Appeal dismissed.

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Solicitor for appellant : *Solicitor of Inland Revenue.*

Solicitor for respondents : *Linklaters & Paines.*

[HOUSE OF LORDS.]

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AND

Feb. 1, 3, 4 ;
March 15. INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Income tax — Company — Debentures — Interest payable in sterling or at option of holder in different foreign currencies at fixed rates of exchange—Payment taken in foreign currency—Whether increased liability on company to tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), All Schedules Rules, r. 21—Finance Act, 1924 (14 & 15 Geo. 5 c. 21), s. 33.

The appellant company in 1931 issued debentures, and, in accordance with the terms of the issue, the principal money and interest were to be paid in sterling in London, or, at the option of the holder, in New York in dollars at the fixed rate of exchange of 4·86 dollars to the £, or in Amsterdam at the fixed rate of exchange of 12·11 Dutch florins to the £. The interest was to be paid by cheque or warrant sent through the post to the registered holder, and it was to be subject to United Kingdom income tax. In accordance with Rule 21, sub-r. 1, of the All Schedules Rules of the Income Tax Act, 1918, which requires that "Upon payment of any interest of money . . . charged with tax under "Schedule D . . . not payable, or not wholly payable out of "profits or gains brought into charge, the person by or through "whom any such payment is made shall deduct thereout a sum "representing the amount of the tax thereon at the rate of tax "in force at the time of payment," and the person so paying is to account "forthwith" to the Inland Revenue for the amount of the tax so deducted, the appellants duly accounted for the tax so deducted. Owing to the depreciation of the £ in 1931, when England went off the gold standard, many debenture-holders encashed their warrants in New York, and a few in Amsterdam, the amounts so obtained being considerably in excess of the amount in sterling appearing on the warrants. Thereupon an additional assessment was made upon the appellants in respect of the warrants cashed in New York and Amsterdam :—

Held (Lord Russell of Killowen dissenting), that the contract between the appellants and the debenture-holders was an obligation to pay in sterling the balance that remained after deducting from the sterling sum the amount of the income tax at the then current rate calculated thereon ; that it was only of the balance so arrived at which the holder could at his option claim payment in the foreign currency ; that the time of the encashment of the warrant subsequent to its being drawn was

* *Present* : LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD MAUGHAM.

of no relevance for the purpose of the Income Tax Act; and therefore that the claim by the additional assessment of the Commissioners of Inland Revenue failed.

Decision of Court of Appeal [1937] 1 K. B. 788 reversed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Lawrence J.

In April, 1931, the appellant company issued 4,500,000 7 per cent. debentures at par, and in accordance with the terms of issue condition 11 of the debentures provided: "The principal moneys, premium (if any) and interest hereby secured shall be paid in sterling at Barclays Bank Ltd. 54 Lombard Street London or other the banks of the company in London for the time being or at the registered office of the company or in U.S.A. dollars at the fixed rate of exchange of 4.86 dollars to the £ at the offices of Messrs. J. P. Morgan & Co. 23 Wall Street New York or in Dutch florins calculated at the fixed rate of exchange of 12.11 Dutch florins to the £ at the offices of Nederlandsche Handel Maatschappij N.V. Amsterdam. The interest on registered debentures will be paid by cheque or warrant on the company's banks sent through the post to the registered address of the holder . . . ; and every such cheque or warrant shall be payable to the order of the person to whom it is sent and payment of the cheque or warrant if purporting to be duly indorsed shall be a satisfaction of the interest." The interest was to be subject to United Kingdom income tax.

On June 30, 1931, and December 31, 1931, interest on the debentures became due, and in respect of this interest warrants were posted to the registered holders to the net amount in sterling of 87,749/., from which income tax at the current rate was deducted.

The company was assessed to income tax under Rule 21 of the All Schedules Rules in the Income Tax Act, 1918 (2) in

(1) [1937] 1 K. B. 788.

(2) Rule 21, sub-r. 1, of the All Schedules Rules of the Income Tax Act, 1918: "Upon payment of any interest of money, annuity,

"or other annual payment charged
"with tax under Schedule D . . .
"not payable, or not wholly pay-
"able out of profits or gains
"brought into charge, the person

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H. L. (E.) respect of the gross interest of 116,998*l.*, and income tax thereon was duly paid.

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Owing to the depreciation of the pound which took place in September, 1931, when England went off the gold standard, many debenture-holders encashed their December interest warrants in New York and a few encashed theirs in Amsterdam.

An additional assessment was made on the company in respect of warrants cashed in New York or Amsterdam because, when the payments of dollars or florins were converted into sterling at the current rate of exchange, the sterling value was considerably in excess of the sum in sterling appearing on the warrants.

The Commissioners confirmed the additional assessment, but Lawrence J. allowed an appeal on the grounds that Rule 21 did not refer to payment outside the United Kingdom; that the contract to pay in foreign currency was a contract to provide a commodity and not a contract to pay interest on money within Rule 21; and that the right to get payment in dollars or florins was an added right.

On appeal by the Commissioners, the Court of Appeal reversed Lawrence J.'s decision, holding that payment of interest was only made by payment at the place and in the currency selected by the holder in exercise of his option, and the deduction of tax under Rule 21 was made at the time of payment by paying a net sum only after deduction

"by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

Sub-r. 2: "Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted"

Finance Act, 1924, s. 33, sub-s.1: "Every warrant or cheque or other order drawn or made in payment of any dividend or interest distributed by any company shall have

"annexed thereto or be accompanied by a statement in writing showing—(a) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid; and (b) the rate and the amount of income tax appropriate to such gross amount; and (c) the net amount actually paid."

Sub-s. 2: "If a company fails to comply with the provisions of this section, the company shall, in respect of each offence, incur a penalty of ten pounds."

of tax; and that Rule 21 applied to payment outside the United Kingdom in a foreign currency although it was necessary for the purpose of bringing the same into computation for the United Kingdom tax to turn it into sterling.

The Corporation appealed to this House.

Latter K.C. and *Andrewes Uthwatt* for the appellants.

It is said on behalf of the respondents that the appellants should have waited to see what each holder who cashed his warrant in New York or Amsterdam received for it, and, if by reason of the depreciation in sterling he received a larger sum in dollars or florins than he would have received in sterling, the tax was to be deducted from that larger sum, and not from the nominal amount for which the warrant was made out. Such a method is quite impracticable, and, moreover, Rule 21, sub-r. 2, requires that the deduction of tax must be made "forthwith" and accounted for to the Commissioners. The tax of so many shillings in the pound is to be deducted—that is, at once—and that requirement the appellants complied with by deducting the tax from the sterling amount. Where it is not specifically provided at whose option one of two alternatives is to be exercised, the rule of law is that the option is in the party who is to do the first act: per Blackburn J. in *Reed v. Kilburn Co-operative Society* (1); and in this case the party to do the first act was the appellant corporation. It is said on behalf of the Crown that the payment was not made till the warrants were cashed; we say that payment was made when the warrants were sent.

[LORD ATKIN. Sending a cheque is only conditional payment.]

Even if that is so, the condition is determined on the cheque being honoured, and "payment" relates back to the date when it was sent.: *Felix Hadley & Co. v. Hadley* (2); *Marreco v. Richardson* (3); *Thairwall v. Great Northern Ry. Co.* (4) In *Payne v. Deputy Federal Commissioner of*

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(1) (1875) L. R. 10 Q. B. 264.

(2) [1898] 2 Ch. 680.

(3) [1908] 2 K. B. 584.

(4) [1910] 2 K. B. 509.

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Taxation (1) the Judicial Committee, in dealing with an Australian income tax appeal, pointed out that in every case the amount payable was to be ascertained by reference to a rate based on a calculation of pence per pound, and that the Australian Acts in referring to pounds and pence were referring to those units of Australian currency known as pounds and pence, and to nothing else—language which exactly applies to the present case. Rule 21 is merely a machinery provision and has no application to payments other than those in sterling.

Sir Donald Somervell A.-G. and R. P. Hills for the respondents. In considering the term “payment” it has to be borne in mind that its meaning may vary in different collocations. Here it has to be construed in relation to the Income Tax Act. The fact that, where a cheque is given and is duly honoured, payment is treated as having been made when the cheque was given, does not involve that the date when in this case the warrants were despatched to overseas holders was the proper date for the purpose of Rule 21. As the amount received by the recipient in the United States or Holland could not be ascertained until he exercised his option of receiving payment in the currency of one or other of these countries, the amount of tax to be deducted and accounted for could only then be ascertained. Foreign currency is in law money—see Bills of Exchange Act, 1882, s. 72, sub-s. 4, which provides machinery for converting it into English currency. An obligation in terms of foreign currency can be sued for in our Courts: see *Société des Hôtels Le Touquet Paris-Plage v. Cummings*. (2) The word “interest” covers interest expressed in foreign currency payable in a foreign country, and the material date for the purpose of Rule 21 is the date when the payee is paid the amount of the warrant. Reliance is placed by the appellants on the word “forthwith” on the obligation to account; but that word merely means “as soon as possible,” that is, as soon as the amount payable to the recipient is ascertained. Till then there is no liability to account. As was

(1) [1936] A. C. 497.

(2) [1922] 1 K. B. 451, 463.

pointed out by Romer L. J. in *Inland Revenue Commissioners v. Lawrence, Graham & Co.*, (1), Rule 21 "imposes
 "an obligation to deduct out of the interest a sum representing
 "the tax thereon. . . . Nor can the Crown be concerned
 "with the form in which the net interest reaches the hands
 "of the creditor." Deduction connotes a deduction of
 something from the nominal amount payable to the holder
 of the warrant, and the date—the only date—on which that
 can be ascertained is when the warrant is paid. Any other
 view may lead to a serious loss to the Revenue.

Latter K.C. replied.

The House took time for consideration.

1938. March 15. LORD ATKIN. My Lords, the question in this appeal is whether an additional assessment for income tax made upon the appellants in respect of the payment of interest on debentures issued by them is rightly made. The material facts and documents are sufficiently set out in the case stated by the Special Commissioners and I need not repeat them. The dispute arises out of the option given to the debenture-holder in the contract for payment of interest to be found in paragraphs 1 and 2 and condition 11 of each registered debenture. It may be noted that the issue of debentures is an issue expressed in sterling 4,500,000*l.* 7 per cent. debentures in debentures of 25*l.*, 100*l.*, 500*l.* and 1000*l.* The obligation in paragraph 1 relating to principal is "in accordance with the conditions endorsed hereon to pay
 " the principal sum of blank pounds sterling
 "or the equivalent thereof in United States America dollars
 "at the rate of 4.86 dollars to the pound or in Dutch florins at
 "the rate of 12.11 florins to the pound." In paragraph 2 the covenant is to pay interest at the rates mentioned which appear to be expressed only by reference to sterling, "such
 "interest to be subject to United Kingdom income tax." The option as to interest is contained only in condition 11 of the debenture which is set out in the case. In pursuance

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of the obligation in the debenture, the company on December 30 and 31, 1931, signed and issued the warrants for interest, one specimen of which is set out as an exhibit to the case and is the example to which the argument has been addressed. In the judgment in the Court of Appeal, delivered by my noble and learned friend Lord Wright, then Master of the Rolls, he states that the document was not a bill of exchange. I am not quite satisfied about this. If it is to be taken as drawn on alternative drawees it would no doubt offend against s. 6 sub-s. 2 of the Bills of Exchange Act. On the face of it it looks as though the only drawee was Barclays Bank and the warrant made payable by them at New York or Amsterdam. But the company seem to have dealt direct with Messrs. J. P. Morgan & Co. in New York and it may be that the warrant must be taken as drawn on them at New York, in which case there would appear to be alternative drawees and the section would apply. If not a bill of exchange, it is not a cheque, and the crossing and marking "not negotiable" seem to lose their statutory effect and not to regain it under s. 17 of the Revenue Act, 1883. The document is probably a bill of exchange within the definition of the Stamp Act. If so, the question may arise as to whether the provision that if presented in New York or Amsterdam it must lie for examination for four days precludes it from being payable on demand and as to the effect on the stamp. The precise legal effect, however, of this somewhat anomalous document is by the way. It is admitted that Rule 21 of the General Rules applicable to all the schedules applied in this case. The question is how that Rule affects this payment. The company say that they have deducted from the sterling amount of interest the amount of income tax calculated in sterling at the appropriate rate: and have accounted for that sum. Income tax, they say, is a tax assessed in sterling at so many shillings and pence in the pound. The Commissioners say that the company were in fact paying dollars to the debenture-holders who elected to be paid in dollars; that the value in sterling of the dollars in fact paid should be taken; that the company

should in the first place deduct from the dollars they pay an amount in dollars which represents the ratio which the tax in sterling bears to the amount payable in sterling ; and should account to the Commissioners for Income Tax on the value in sterling of the dollars paid under the option at the rate of exchange of the date when the warrant is cashed, i.e., when the dollars are received. The difference is shown in the figures in the case for the payment in December, 1931, taking the nett figures which are sufficient to illustrate this point. The sterling amount of warrants cashed in New York was 72,171*l.* 13*s.* 1*d.*, representing at the fixed rate of exchange 4·86, \$350,754·12. But that number of dollars valued at 3·39, the rate of exchange at the date of the warrant, was worth 103,467*l.* 5*s.* 8*d.* The company therefore are liable to an additional assessment of over 31,000*l.* The figure calculated at the rate of exchange at the actual dates of payment is more in favour of the appellants as the value of the dollar had slightly diminished since December 31.

If this had been a simple order for payment abroad in a foreign currency with no provision for a fixed rate of exchange, e.g., dollars, and the obligation of the company had rested on Rule 21 alone, I should have felt more difficulty in the matter than was experienced by the Court of Appeal. I can understand it being said in such a case that by deducting from the number of dollars such a number of dollars as bears the same proportion to the whole, as the rate of income tax expressed in sterling, the payer is deducting "a sum representing the amount of the tax thereon at the rate of tax in force," e.g., if he had to pay 4000 dollars and the rate of income tax was 5*s.* in the £, he might be said to be making payment of interest of "money," and by deducting 1,000 dollars to be deducting a sum representing the amount of tax. But by the second paragraph of the rule his duty is "forthwith" to "deliver . . . an account of the payment . . . and of the tax" deducted out of the payment . . . : and the Special Commissioners "shall assess and charge the "payment of which an account is so delivered on that person."

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The charge must obviously be in sterling and assumes therefore that the payment and the tax deducted is in sterling, and it seems to me difficult to apply these terms to a payment and deduction of tax in a foreign currency. I find it still more difficult to apply the terms of the original Rule as it stood before amendment by the Finance Act, 1927, s. 26, sub-s. 1, for in the original rule the obligation to account was "of the *amount* deducted" not "tax deducted" and every such amount shall be a debt from him to the Crown and shall be recoverable as such, and in my opinion there can be no debt in this country of an amount in foreign currency. I find it difficult to believe that the Finance Act, 1927, made a change in this respect. It is said, however, that the sterling amounts can be calculated by reference to the rate of foreign exchange. If this is taken at the exchange of the day when the order for payment is given, I can understand the obligation to account "forthwith" being said to be performed. But if the rate of exchange is to be taken as of the varying days when each interest warrant is cashed, the machinery seems to me to break down. I cannot think that the Rule imposes upon the company the obligation to render a separate account for each interest warrant as and when paid or that the Commissioners are intended to make a series of assessments and charges for each such account. There is no provision at all for provisional and final assessments, and I think it plain from the nature of the case that the intention of the rule is that there should be one accounting "forthwith" which in the case of warrants in a foreign currency which have to reach the foreign bank and have six months in which to run is in a business sense impossible. But the matter does not rest there. By s. 33 of the Finance Act, 1924, which is to be read with the Income Tax Act, 1918, and was in force when the General Rule 21 was altered by the Finance Act, 1927, every interest warrant drawn or made by a company must have annexed thereto or be accompanied by a statement in writing showing "(a) the gross amount which, after deduction of "the income tax appropriate thereto, corresponds to the "net amount actually paid; and (b) the rate and the amount

"of income tax appropriate to such gross amount ; and
 "(c) the net amount actually paid." Here is nothing about
 "sum representing the amount of the tax." You must
 show when you draw the warrant the gross amount which,
 after deduction of the income tax appropriate thereto,
 corresponds, etc., and also the rate and amount of income
 tax. I do not see how you can deduct income tax, which is a
 tax in sterling, from dollars ; and in a case where the tax is
 based on the value of the dollars at a future time it appears
 to be impossible to comply with the section. I therefore should
 have found great difficulty in supporting this assessment had
 the obligation been a direct obligation confined to payment
 in dollars. But in the circumstances of the present case
 the problem is not so troublesome. In my view, taking into
 account all the documents, the primary obligation is to pay
 in sterling, and the stipulation "subject to United Kingdom
 "income tax" confirms this. The contract is to pay to
 the holder the balance that remains after deducting from
 the sterling sum the amount of the income tax calculated
 on that sterling sum, and it is the balance only which the
 holder at his option can claim payment of in the foreign
 currency. I think that the true view is that for income
 tax purposes the company pay the interest in sterling ; and
 perform their obligation to the Revenue by deducting the
 correct amount in sterling and accounting for it as they have
 done. If any of the debenture-holders by receiving dollars
 have obtained in money's worth more than the value of the
 sterling sum deducted, they would be assessable with the
 extra value if the authorities are in a position to assess them.
 I am bound to say that I am glad to arrive at this result,
 for this is machinery procedure by which the payers of interest
 are made vicariously liable for tax due from the recipients.
 The contention of the Crown would impose onerous duties
 on persons who are taxable merely as agents ; and if such
 burdens as are suggested in the present case are to be placed
 on agents for the convenience of the Revenue the statutory
 provision ought to be clearly expressed. I will only add that
 in my opinion nothing in this case throws doubt upon the

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obligation of a taxpayer to account in a sterling valuation for profits and gains which he receives in foreign currency ; or can in any way interfere with the free play of commerce expressed in any currency which the business man finds suitable. I am of opinion that this appeal should be allowed and that the order of Lawrence J. should be restored ; and that the respondents should pay the costs here and in the proceedings below.

LORD THANKERTON. My Lords, I concur in the opinion which has just been delivered by my noble and learned friend, but out of respect to the learned judges of the Court of Appeal, I desire to add some observations.

The decision of this appeal turns mainly on the construction of Rule 21 of the General Rules of the Income Tax Act, 1918, as amended by the Finance Act, 1927, and s. 33 of the Finance Act, 1924. Sub-s. 1 of Rule 21 provides, " 21. (1) Upon "payment of any interest of money, annuity, or other annual "payment charged with tax under Schedule D, or of any "royalty or other sum paid in respect of the user of a patent, "not payable, or not wholly payable, out of profits or gains "brought into charge, the person by or through whom any "such payment is made shall deduct thereout a sum repre- "senting the amount of the tax thereon at the rate of tax "in force at the time of payment." Sect. 33 of the Finance Act, 1924 provides, " 33. (1) Every warrant or cheque or "other order drawn or made, or purporting to be drawn or "made, after the thirtieth day of November, nineteen hundred "and twenty-four, in payment of any dividend or interest "distributed by any company, being a company within the "meaning of the Companies (Consolidation) Act, 1908, or a "company created by letters patent or by or in pursuance "of an Act of Parliament, shall have annexed thereto or be "accompanied by a statement in writing showing—" (a) "the gross amount which, after deduction of the income "tax appropriate thereto, corresponds to the net amount "actually paid ; and (b) the rate and the amount of

"income tax appropriate to such gross amount ; and (c) the "net amount actually paid."

There has been much debate as to the meaning of "time of payment" in Rule 21, and, if the matter depended on that rule alone, difficulty might arise as to when payment is made within the meaning of the Rule. But, in my opinion, any doubt as to its meaning is resolved in the case of companies to whom s. 33 of the Act of 1924 applies, of whom the appellant company is one, as regards the payment of the interest due on its debentures.

Sub-s. 1 of s. 33 relates to the time when the warrant or cheque or other order is drawn or made, and, in my opinion, clearly regards that time as the period of distribution, and it places the duty of complying with its provisions on the company that draws or makes the warrant, cheque or other order. The almost invariable method of distributing such warrants, cheques or other orders is by posting them, and it seems to me inevitable that the duty enjoined by the section must be performed before such posting, and that the figures prescribed by heads (a), (b) and (c) must equally be ascertained and embodied in the annexure or accompanying statement referred to in the section before posting the warrants, cheques or other orders. With all respect to the learned judges of the Court of Appeal, whose judgment stops short of dealing with this point, I am unable to understand how the time of the encashment of the warrant, cheque or other order—at a period subsequent to its being drawn or made—can be of any relevance for the purposes of the section. This is confirmed, as my noble and learned friend has pointed out, by the provision in sub-s. 2, as amended, of Rule 21, that the account is to be delivered "forthwith" to the Commissioners of Inland Revenue.

I further agree with my noble and learned friend that the figures contemplated by heads (a), (b) and (c) of s. 33, sub-s. 1, are clearly figures in sterling, and that, in the present case, the primary obligation of the appellants is to pay the debenture interest in sterling, subject to United Kingdom income tax, and that the option given to the debenture-holders to claim

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I am therefore of opinion that the appellants did conform to the provisions of Rule 21 and s. 33 of the Act of 1924, and that the appeal should be allowed.

LORD RUSSELL OF KILLOWEN. My Lords, I find myself in disagreement with your Lordships, for to my mind the judgment of the Court of Appeal is both convincing in its reasoning and sound in its conclusions.

I will not restate the facts which are not in dispute, but I will indicate what I conceive to be the question which we are called upon to determine, stating it in terms of, and by reference to, the interest warrant (Exhibit C) which was sent on December 30, 1931, to the registered debenture-holder, Rhodesian Anglo-American, Ltd. The question which we have to answer, as I understand it, is this : The debenture-holder, having received from the company in respect of debenture interest a sum of 201,448 dollars which at the date of receipt was worth, at the then current rate of exchange, a sum in sterling largely in excess of the net amount of sterling stated in the warrant to be payable, is the company accountable and assessable under Rule 21 of the General Rules of the Income Tax Act, 1918, for more than the sum in sterling which was deducted from the gross interest expressed in sterling, in arriving at the net amount of sterling stated in the warrant to be payable to the debenture-holder ? If the case falls within, and fits into, the wording of Rule 21, there can be no escape from the view that the company is bound to deduct the full tax for which the debenture-holder is liable, and to pay it to the Commissioners of Inland Revenue.

The following is an extract from Rule 21 as amended by s. 26 of the Finance Act, 1927 : “ (1) Upon payment of “any interest of money, annuity, or other annual payment “charged with tax under Schedule D, or of any royalty or “other sum paid in respect of the user of a patent, not payable, “or not wholly payable, out of profits or gains brought into “charge, the person by or through whom any such payment

"is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment. " (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person." Does the case fall within, and fit into, the wording of that Rule? Apart from the question as to what is "the time of the payment" under the Rule, I see no difficulty. The words "interest of money, annuity or other annual payment charged with tax under Schedule D" must include cases where payments of those kinds are payable in foreign currencies; and it is quite feasible to deduct thereout upon payment thereof the proper fraction thereof, which will (whatever be the rate of exchange then prevailing) necessarily answer to the words "a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment." It was suggested that the word "sum" postulated a sum of sterling; but I can see no ground for this. In the case of a payment in foreign currency a direction to deduct a sum thereout naturally refers to a sum in that currency; and it would appear as if the direction were phrased in general terms (instead of being a simple direction to deduct the amount of the tax) in order to cover the cases of payments in currencies other than sterling.

So, conformably with that reading of Rule 21, sub-r. 1, the warrant could, in the present case, have been framed, and the appropriate deductions have appeared upon its face. The Court of Appeal have pointed out how the warrant inferentially shows the appropriate deductions as matters of mere arithmetical calculation based upon the fixed rates of exchange which are stated on its face. But they could

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have been shown in tabular form, with a column devoted to each kind of currency. It is a matter of difficulty to state accurately what kind of a document the warrant is in law. It purports to be a cheque drawn on a London bank for the payment to the debenture-holder or order of a sum in sterling; but in fact it is a document entitling the payee or order to receive payment of either a sum in sterling from a London bank, or a sum in dollars from a firm in New York, or a sum in Dutch florins from an institution in Amsterdam. But whatever the document may be in law, it could have shown on its accompanying certificate of deduction of income tax the gross amounts of interest, the appropriate deductions for income tax, and the net amounts payable in each of the three currencies. Thus assuming, for simplicity's sake, a gross sum for interest in sterling of 1000*l.*, and fixed rates of exchange of 4 dollars to the £, and 12 florins to the £, the income tax being at 5*s.*, there could have appeared (1.) a sterling column showing 1000*l.* gross with a deduction of 250*l.* income tax, leaving a net sum payable of 750*l.*; (2.) a dollar column showing 4000 dollars gross, with a deduction of 1000 dollars "representing" the amount of tax, leaving a net sum payable of 3000 dollars; and (3.) a florin column showing 12,000 florins gross, with a deduction of 3000 florins "representing" the amount of tax, leaving a net sum payable of 9000 florins. In each case, whatever might be the rate of exchange prevailing when the debenture-holder cashed the warrant and received payment in a foreign currency, there would have been deducted by the company making the payment from the gross amount of interest "a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment."

But the question is then raised, what is the time referred to in Rule 21 by the words "upon payment," and "the time of payment"? I feel no difficulty in this regard. It must in my opinion refer to the moment of time when, as between the person liable to make the annual payment, and the person entitled to receive it, the liability of the former is discharged. When did payment take place in the present

case? No doubt as a general rule the giving and acceptance of a debtor's cheque is a conditional payment, and upon the cheque being subsequently met, the payment for many purposes is by relation back treated as having in fact been made on the earlier date. It by no means follows, however, that this artificial view of the true facts applies to Rule 21. In the present case, moreover, the eleventh condition of the debenture establishes in my opinion that as between the company and the debenture-holder the liability to pay the interest is only satisfied when the warrant is cashed, and that the posting of the warrant is in no sense payment of the interest, conditional or otherwise. Indeed, if the theory of conditional payment be applied here and if this warrant be in law a cheque and the posting of it be conditional payment, the interesting result will follow that a conditional payment of sterling made on December 30, 1931, in England will become an actual payment of sterling as on that date, by reason of the receipt on January 9, 1932, of a sum of dollars in New York. Or is it that the conditional payment of sterling becomes retrospectively an actual payment of dollars? I know not.

I am of opinion that payment of the interest was made within the meaning of Rule 21, when each warrant was cashed, and that upon each payment there should have been deducted the proper proportion of sterling, dollars or florins according to the currency in which the payment was made, for which the company would have to account to the Inland Revenue in sterling at the rate of exchange prevailing at the time when the interest was paid. The account must be delivered "forthwith," but this requirement of Rule 21 will be complied with if the accounting takes place without delay, i.e., as soon as is reasonably possible in the circumstances.

The case seems to me to fall naturally and properly under the provisions of Rule 21; and I do not find that this view of the case is in any way hampered by s. 33 of the Finance Act, 1924. That section appears at first sight to be not very happily worded, because, while dealing with what is to be included in a warrant which a company is drawing, it seems

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to refer, in stating what is to appear thereon, to the moneys with which it is dealing as "actually paid"; but in fact the section is dealing with what must appear in a warrant which has been cashed, because it refers to the dividend or interest in question as having been distributed by the company. But on any view of the section, a warrant, drawn with the three columns for the different currencies, would comply with the section, showing, as it would, "the rate "and amount of income tax appropriate to the gross amount "of interest." I note that here again the enactment uses general words, namely, "appropriate to," which can well cover the case of an appropriate deduction from a foreign currency. But I agree with the Court of Appeal that in any event the position under Rule 21 is unaffected.

I would dismiss the appeal.

LORD MACMILLAN. My Lords, I am in agreement with the opinions which have been delivered by my noble and learned friends Lord Atkin and Lord Thankerton. I am also in agreement with the opinion of Lord Maugham, which I am about to read.

LORD MAUGHAM (read by LORD MACMILLAN). My Lords, this appeal raises the question whether the appellant company by the joint effect of Rule 21, sub-r. 1, of the General Rules of the Income Tax Act, 1918 (as amended by s. 26 of the Finance Act, 1927) and of s. 33 of the Finance Act, 1924, was liable when it paid interest by cheques or warrants on its debentures on December 31, 1931, to deliver a single account of the payments and of the tax deducted out of these payments as at December 31, or, whether it was liable as each cheque or warrant was cashed, whether in London, New York or Amsterdam, to deliver a separate account of the payment on each cheque or warrant and of the amount of the tax deducted out of such payment. It should be added that Rule 21 and s. 33 of the Act of 1924 have to be construed together (see s. 41, sub-s. 1 of the latter Act).

These two provisions, in general, occasion no difficulty ;

but in this case the debentures are in an unusual form, one which does not seem to have been contemplated by the Legislature. By the terms of the trust deed the company is liable to pay to the registered holder the amount secured in pounds sterling or the equivalent thereof in U.S.A. dollars at the rate of \$4.86 to the £ or in Dutch florins at the rate of 12.11 Dutch florins to the £. As regards interest it has to be paid at the rate of 7 per cent. by equal half-yearly payments on June 30 and December 31 in each year either in sterling at Barclays Bank in London or in United States dollars at the rate of 4.86 dollars to the £ at the offices of Messrs. J. P. Morgan & Co. in New York or in Dutch florins at the rate of exchange of 12.11 Dutch florins to the £ at the offices of a Dutch bank in Amsterdam.

The company's registered office is in England, the debentures are sterling debentures, all of which are registered in England at the company's registered office, interest is expressly made payable subject to United Kingdom income tax, and the debentures provide (condition 11) that the interest "will be "paid by cheque or warrant on the company's bankers sent "through the post to the registered address of the holder, "or in the case of joint holders to the registered address of "the one who is first named on the register : and every such "cheque or warrant shall be payable to the order of the person "to whom it is sent and payment of the cheque or warrant "if purporting to be duly endorsed shall be a satisfaction "of the interest." It is, therefore, clear that the debenture-holders were entitled to cheques or warrants on the company's bankers for the amount of the interest due to them in sterling. The superadded alternative rights were to obtain instead of sterling amounts of American dollars in New York or Dutch florins in Amsterdam at fixed rates of exchange. It is an irrelevant fact for the purposes of the appeal that a prudent debenture-holder would be likely (in and subsequent to December, 1931), to prefer to receive American dollars in New York or Dutch florins in Amsterdam owing to the fact that sterling had depreciated in the United States and in Holland. He was entitled to receive his interest in sterling

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H. L. (E.) in London ; and by the cheque or warrant he was (according to the usual practice) given six months before he was bound to cash the cheque or warrant in London or to require the payment of the proper equivalent amounts of dollars or florins at the pegged rates above stated. A certain number of debenture-holders in fact cashed their cheques in London.

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My Lords, it is I think indisputable that the function of a company in such a case is to act as collector for the Commissioners of Inland Revenue. The company, where any such payment is made, has forthwith to deliver an account to the Commissioners of the payment and of the tax deducted out of the payment and the Special Commissioners must assess and charge on the company the payment of which an account is so delivered. Next, it is plain that the liability of the company arises upon payment of the interest, and the obligation to deduct the tax is imposed at the time of payment. Payment and deduction are concurrent ; and it was admitted on behalf of the Crown that the deduction of the tax must be at the rate of tax in force at the time of the payment. In my opinion it is clear that the deduction must be in sterling : it is a deduction of " a sum representing " the amount of the tax," a phrase which might be ambiguous, but the account to be delivered to the Commissioners must be an account in sterling, since the Commissioners have to " assess and charge the payment of which an account is so " delivered."

In the case of a company paying dividends or interest by warrant, cheque or other order (s. 33, sub-s. 1), there is a further liability imposed with a penalty for non-compliance. An explanation of the tax deduction made by the company has to be annexed to the warrants or cheques showing :—
" (a) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid ; and (b) the rate and the amount of income tax appropriate to such gross amount ; and (c) the net amount actually paid."

It is to be noted that the warrants, cheques or other orders are described in the section as being drawn or made " in

"*payment* of any dividend or interest distributed by" the company. In my opinion since this section has to be construed with Rule 21, it follows that in the case of a company the Legislature is recognizing the fact that such cheques, warrants, or orders are in general usage in these cases and are treated in the commercial world as payment of the dividend or interest, and, what is more to the purpose, the sub-section is distinctly providing that the tax is to be deducted at the date of posting the cheque. This is clear from the fact that the tax deduction must be at the rate of tax in force at the time of the payment which is assumed to be made by warrant, cheque or order. In a case where, as usual, the cheques need not be cashed for six months, the company could not comply with either (a), (b) or (c) of the particulars which have to accompany the cheques if they were posted (as in this case) at a time less than six months before the date of the Budget resolutions, for the rate of tax might be altered. In other words s. 33 requires statements to be sent to the shareholder or debenture-holder, with the warrants or cheques described as payment, which *could not* be completed unless the amount of tax to be deducted was of tax at the rate when the warrants or cheques are posted. It follows inevitably that in the ordinary case where a company pays its dividends or debenture interest by cheque or warrant, the account to be delivered forthwith to the Commissioners is of the payments so made and of the tax deducted at the rate then in force. It is impossible to make the machinery adopted in Rule 21 and s. 33 applicable if it were to be held to be that there is no payment within the rule until the warrants or cheques are cashed.

Apart from the express terms of s. 33, sub-s. 1, a similar conclusion might be founded on the well-known common law rules as to the effect of the sending of a cheque in payment of a debt, and in the fact that though the payment is subject to the condition subsequent that the cheque must be met on presentation, the date of payment, if the cheque is duly met, is the date when the cheque was posted. It will be remembered that by condition 11 of the debentures the

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H. L. (E.) interest is payable to the debenture-holder by sending the cheque or warrant by post, which brings the case within the principles laid down in *Norman v. Ricketts* (1); *Marreco v. Richardson* (2); and *Thairlwall v. Great Northern Ry. Co.* (3). But in my opinion the conclusion that the cheque or warrant is payment for the purposes of Rule 21 is a consequence of the correct construction of that rule together with s. 33.

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Is this position in any way altered by the fact that the warrants, cheques or orders in this case contained on their face statements that they were payable at the option of the holder at any time within six months in sterling at Barclays Bank, Lombard Street, or in dollars at the fixed rate of exchange of \$4.86 to the £ at the offices of J. P. Morgan & Co. in New York, or in Dutch florins at 12.11 florins to the £ at a bank in Amsterdam? My Lords, if it is admitted, and I see no escape from the admission, that every debenture-holder was entitled on December 31 to a cheque or warrant on the company's bankers in sterling, it follows that the company was at that date under a statutory duty to comply with Rule 21 and s. 33, that is, it was bound to deduct from the amount due for interest a sum representing the amount of the tax thereon at the rate of tax in force at that time, and to accompany the cheque or warrant by a statement containing the particulars under heads (a), (b) and (c) of section 33 (1). That statement could not state anything then unknown, and therefore could not state the rate and the amount of income tax which would become due if the holder of the cheque or warrant exercised his option to take dollars in New York or florins in Amsterdam at an uncertain date before June 30, since not only the rate of income tax at the date of encashment, but also the rate of exchange from dollars or florins into sterling at that date were alike unknown; and no account could be rendered of the tax deducted in respect of the profit or gain on the exchange if the option to take foreign currency were to be exercised. It

(1) [1886] 3 Times L. R. 182.

(3) [1910] 2 K. B. 509.

(2) [1908] 2 K. B. 584.

is not to the point to state that the amounts of dollars or florins could be stated: the point is that the amount of the appropriate deduction of tax in respect of the foreign currencies could not be known at the date, December 31, when a duty to comply with Rule 21 and s. 33 arose as regards the warrants or cheques sent to the debenture-holders.

This in my opinion is sufficient for the decision of the appeal. It will be noted that I express no opinion as to the position which may arise when the interest consists simply of a warrant for payment of an amount in a single foreign currency. It may be that the rule and the section can be applied in such a case if it can be held that the payment within the rule is not made till the warrant is encashed. Being satisfied that warrants or cheques in payment of interest were made in this case on December 31 and that the obligations of the company under Rule 21 and s. 33 forthwith arose, it is my opinion that the company complied with its duties on December 31, and that no further obligations were imposed on it. In other words I think that the rule and section imposing on the company the duty of collecting the tax on interest cannot be held to extend to the collection of duty upon what Lawrence J. calls the added rights to get dollars or florins. In substance I agree with his judgment. The Crown, in my view of the case, must be left to collect the duty in respect of the added rights by means of its own exertions. I concur in the proposed motion.

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Appeal allowed.

Solicitors for appellants: *Holmes, Son & Pott.*

Solicitor for respondents: *Solicitor for Inland Revenue.*

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H. L. (Sc.)* THE LORD ADVOCATE APPELLANT ;
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Revenue—Estate duty—Property passing on death—Policy of assurance—Policy partially kept up by deceased for benefit of donee—Proportion of policy money on which duty payable—Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub s. 1.

By s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, amending the Customs and Inland Revenue Act, 1881, account duty, now estate duty, is payable on money received under a policy of assurance effected by any person on his life "where the policy is wholly kept up by him for the benefit of "a donee, whether nominee or assignee, or a part of such money "in proportion to the premiums paid by him, where the policy "is partially kept up by him for such benefit."

S. effected a policy on his life for 20,000*l.* in 1910. In 1925, having by then paid fourteen premiums, he executed a gratuitous assignment of the policy in favour of the respondents. After the assignment S. paid the next four premiums, and the respondents paid the remaining seven to the date of the death of S. when the policy money was paid to the respondents :—

Held, that the proceeds were liable to estate duty to the extent of the proportion which the number of premiums paid by the donor after the assignment bore to the total number of premiums paid during that period—namely, on four-elevenths of the policy money.

Dictum of Rowlatt J. in *Attorney-General v. Meech* (1931) 15 Annotated Tax Cases 619 approved.

Lord Advocate v. Fleming [1897] A. C. 145 considered.

Decision of First Division of Court of Session 1937 S. C. 645 reversed.

APPEAL from the First Division of the Court of Session. (1)

The late Archibald Dominic Smith Sligo (hereinafter referred to as "the deceased"), on June 7, 1910, took out a policy of assurance on his own life for 20,000*l.*, the annual premiums thereon being payable on April 30, in each year.

(1) 1937 S. C. 645.

* *Present*: LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON LORD MACMILLAN, and LORD ROMER.

In April, 1924, the deceased transferred the policy to the respondents, a private unlimited company, to which he also transferred his landed estates in February, 1925. The transfer of the policy, though it bore to be for a consideration, was in fact gratuitous. Up to the date of the taking over of the policy by the respondents in April, 1924, the annual premiums falling due were regularly paid by the deceased. Thereafter the deceased paid the four annual premiums falling due from April, 1924, to April, 1927, inclusive. From then until the death of the deceased on April 23, 1935, the annual premiums were paid by the respondents. At the date of the deceased's death, twenty-five annual premiums had thus been paid, eleven subsequently to the taking over of the policy by the respondents, four by the deceased and the remaining seven by the respondents. Following on the death of the deceased the policy money amounting to 21,800*l.* was paid to the respondents. The Inland Revenue Commissioners claimed that by reason of the deceased's payment of four premiums after the assignation of the policy it had thereby been partially kept up by him for a donee after that date, and that accordingly a proportion of the proceeds of the policy fell to be assessed for estate duty under s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889 (1), and s. 2, sub-s. 1 (c) of the Finance Act, 1894. (2) The respondents

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(1) Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1: "Sub-section two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended, as follows:— . . . The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the first day of June, one thousand eight hundred and eighty nine, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where

"the policy is partially kept up by him for such benefit."

(2) Finance Act, 1894, s. 2:

"(i) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . (c) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property . . ."

H. L. (Sc.) did not dispute their liability to estate duty under these sections but contended that the duty payable fell to be calculated in the proportion that the four premiums paid by the deceased after the taking over of the policy by the respondents bore to the total premiums paid on the policy since its inception, that is, on four twenty-fifths of the total proceeds. The Inland Revenue Commissioners maintained that duty was payable on the same proportion of the policy money as that which the premiums paid by the deceased after the assignation bore to the total premiums after that date—namely, on four elevenths, and the assessment was in fact made on that basis. The respondents, being aggrieved thereby, appealed to the Court of Session.

The First Division of the Court of Session (Lord Morison dissenting) held that the contention of the present respondents was right—namely, that duty was payable on four twenty-fifths of the policy money.

The Lord Advocate for and on behalf of the Inland Revenue Commissioners appealed to this House.

T. M. Cooper L.A., J. H. Stamp (of the English Bar) and *T. B. Simpson* (of the Scots Bar) for the appellant. It is common ground between the parties that some portion of the proceeds of the policy is liable to estate duty ; and the question is, what portion ? We submit that the intention of the Legislature was to measure the liability to duty in proportion to the burden undertaken after assignment by the donor and donee respectively. To invoke any reference to the donee before the donation is contrary to the obvious intention of the section. In *Lord Advocate v. Fleming* (1), the facts were different in this respect that, after donation, the donee paid all the premiums, and for that reason the Crown was held disentitled to claim duty. That decision makes it clear that the section has no application except where a policy has been either wholly or partially kept up for the benefit of the donee, and therefore regard must be had only to the payments of premiums after the assignment. In *Attorney-*

(1) [1897] A. C. 145.

General v. Meech (1) Rowlatt J. said this in reference to the section in question: (2) "I think it simply means that, "where after the assignment what has kept up the policies "has been provided partly by the assignor and partly by the "assignee, the policy moneys are to be subject to and escape "duty in the same proportion."

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J. G. M'Intyre K.C. and *William Grant* (both of the Scots Bar) for the respondents. It cannot be said that a policy of insurance is being kept up for the benefit of a donee before the donee comes into existence. In *Lord Advocate v. Robertson* (3), Lord President Robertson said this: "There "must be a donee designated, in order that the keeping up "of the policy may be held to be for his benefit. This, I "think, is the fair reading of the section, and the result seems "to be highly reasonable. Up to the time of the assignation, "the policies in question were absolutely the property of "Mr. Fleming, and the moneys paid by him by way of "premiums were applied simply towards creating or preserving "an asset of his estate. If, at the date of the assignation "he chose to give that asset away, as he did absolutely, inter "vivos, I can see no reason, founded in the provisions of the "Acts of 1881 and 1889, why any part of that gift should be "charged with duty." It is not accurate to say that a policy is "kept up" by payments in part; it is kept by the totality of payments from the time the policy is taken out. A policy is "wholly kept up" by being kept up throughout the whole period of its currency. In *Attorney-General v. Meech* (1), this point might have been, but was not, advanced in argument, consequently Rowlatt J.'s observation founded on for the appellant was obiter.

T. M. Cooper L.A. in reply. If all the premiums are to be taken into account, why should the section use the words "for the benefit of the donee"? During the earlier years of its currency the policy was not kept up "for the benefit of "the donee." It is only after the assignment that the keeping up for his benefit begins.

(1) (1931) 15 Annotated Tax Cases 619.

(2) Ibid. 622.

(3) (1895) 22 R. 568, 573.

H. L. (Sc.) The House took time for consideration.

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April 12. LORD MAUGHAM L.C. My Lords, I am authorized to say that my noble and learned friends Lord Atkin and Lord Romer concur in the opinion which I am about to deliver.

This is an appeal against an interlocutor dated March 25, 1937, pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland. The First Division, by a majority, allowed the appeal of Inzievar Estates, the present respondents, and set aside an assessment made by the Commissioners of Inland Revenue, and remitted the matter to the Commissioners to readjust the same. The Lord Advocate, on behalf of the Commissioners, supports the present appeal.

The facts are fully stated in the opinion of my noble and learned friend Lord Macmillan, and I shall do no more than state them in the barest outlines. Mr. Archibald Dominic Smith Sligo, of Inzievar, Fife, effected a policy of assurance on his life for 20,000*l.* in the year 1910. In 1925, having already paid fourteen premiums, he executed a gratuitous assignation of the policy in favour of the respondents. After the assignation had been granted and intimated he paid the next four premiums. The respondents paid the remainder of the premiums—seven in number—which fell due up to the date of the death of Mr. Smith Sligo in 1935. The proceeds of the policy, amounting in all to 21,800*l.* were paid to the respondents. It is admitted that some estate duty is in these circumstances payable under s. 11, sub-s. 1 of the Customs and Inland Revenue Act, 1889, and s. 2, sub-s. 1 (c) of the Finance Act, 1894. The question is: What is the proportion of the policy moneys in respect of which estate duty is so payable?

It will be convenient to set out the relevant portions of the two sections on which the appeal turns.

The Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), provides: “11. (1.) Subsection two of section thirty-eight of “the Customs and Inland Revenue Act, 1881, is hereby “amended, as follows:—

.

“The charge under the said section shall extend to money
 “received under a policy of assurance effected by any person
 “dying on or after the first day of June, one thousand eight
 “hundred and eighty-nine, on his life, where the policy is
 “wholly kept up by him for the benefit of a donee, whether
 “nominee or assignee, or a part of such money in proportion
 “to the premiums paid by him, where the policy is partially
 “kept up by him for such benefit.”

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The Finance Act, 1894 (57 & 58 Vict. c. 30), making provision for estate duty enacted :—

“2. (1.) Property passing on the death of the deceased
 “shall be deemed to include the property following, that is
 “to say :—

.

“(c) Property which would be required on the death
 “of the deceased to be included in an account under section
 “thirty-eight of the Customs and Inland Revenue Act,
 “1881, as amended by section eleven of the Customs and
 “Inland Revenue Act, 1889, if those sections were herein
 “enacted and extended to real property as well as personal
 “property, and the words ‘voluntary’ and ‘voluntarily’
 “and a reference to a ‘volunteer’ were omitted therefrom.”

The provision in s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, is elliptical and, as the Lord President has observed, leaves to implication the proportion which has to be applied in a case where the policy is partially kept up by the donor for the benefit of the donee. I think the matter might be somewhat clearer if the sub-section were rewritten in the following expanded form :—

“The charge under the said section shall extend to moneys
 “received under a policy of assurance effected by a person
 “on his own life who shall die on or after the 1st June 1889,
 “notwithstanding that he shall have taken out the policy
 “in the name of a nominee, or shall have assigned the policy
 “gratuitously for the benefit of a donee, subject to the
 “following provisions :—

“(1.) Where the policy is wholly kept up by the person
 “who effected the same for the benefit of a donee, whether

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“nominee or assignee, the charge shall extend to the whole
“of the policy moneys.

“(2.) Where the policy is partially kept up by such
“person for the benefit of a donee, whether nominee or
“assignee, the charge shall extend to a part of the policy
“moneys in proportion to the premiums paid by that
“person.”

It will be observed that in so expanding the sub-section I have made no assumptions as to its true construction. I have only stated it in such a way as will, I think, assist in ascertaining the true meaning of that part of the section which I have put in the second paragraph. Some light is, however, thrown upon the meaning of the sub-section by the decision of this House in the case of the *Lord Advocate v. Fleming*. (1) This was a decision, so far as revelant, on the meaning of s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881. It was held by this House, agreeing with the decision in the Court of Session, that a policy cannot be said to be kept up for the benefit of a donee until a donee has in fact been created. Accordingly, where the donee has paid all the premiums after the date of the assignment, no account duty is payable by the donee under the Act. It follows that the first provision of the section, as above expanded, can be clarified by making it run thus: “Where the policy “after the date of a donation is wholly kept up by the donor “for the benefit of a donee, the charge, etc.” By parity of reasoning, the second provision may be read as follows: “Where the policy after the date of a donation is partially “kept up by the donor for the benefit of the donee, the “charge under the section is to extend to a part of the “policy moneys in proportion to the premiums paid by the “donor.”

The question is, what does the word “proportion” signify? It is not in dispute that the numerator in the fraction, which the word proportion is pointing to, must be the number of premiums paid by the deceased after the donation in 1925. The numerator in this case is, therefore, the figure 4. The

question is whether the denominator is 25, since there had been twenty-five annual premiums in all paid on the policy, and this is the result of the decision of the Court of Session, or whether, on the other hand, the denominator is to be the number of annual premiums paid on the policy after the date of the assignation—namely, the figure 11, as the Crown contends.

It is, I think, clear that the reference to a case where the policy is partially kept up for the benefit of the donee must include a case where the donor and the donee share in the payment of the annual premiums, though I do not think the phrase can possibly be confined to such a case. Where, however, the donor and the donee have shared in the payment of some or all of the premiums after the date of the assignation, it would seem plain that the proportion designated in the sub-section is the proportion in which they have paid such premiums after the donation. Moreover, in the latter part of the sub-section, that portion which I have expanded in the second provision as above, the Legislature is dealing, as I think, with events which happen after the assignation. There is nothing to indicate that the previous history as to the person who provided the premiums before the assignation has any bearing upon the matter. It would be strange if the fraction were to be affected by the circumstance that premiums under the policy of assurance effected by the donor had been paid during the early years by an affectionate parent or by any other third party. Moreover, the sub-section seems to me to show by its language that the proportion is to be determined by events which take place after the donation, since those events only, according to the natural construction of the words, are contemplated by the use of the present tense in the two phrases "is wholly kept up, etc.," and "is partially kept up, etc." This result, indeed, would seem necessarily to follow if the expansion of the section which I have suggested is accepted. For these reasons I come to the conclusion that the proportion must be taken to be a proportion based upon the shares which the donor and donee respectively have taken in keeping up the policy after the date of the assignment. This conclusion

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H. L. (Sc.) agrees with the opinion of Lord Morison in the First Division; and it also appears to have been the view taken by Rowlatt J. in the case of *Attorney-General v. Meech* (1), to which we have been referred.

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The appeal of the Crown should be allowed and the original assessment must be maintained.

LORD THANKERTON. My Lords, I agree with the opinion which has been delivered by my noble and learned friend on the Woolsack and in one about to be delivered by my noble and learned friend Lord Macmillan.

LORD MACMILLAN. My Lords, in 1910 the late Mr. Smith Sligo took out a policy of assurance for 20,000*l.* on his life with the Scottish Metropolitan Assurance Co., Ltd. In 1924 he transferred the policy to the respondents, a private unlimited company, to which shortly afterwards he transferred also his landed estates. The transfer of the policy, though stated to be in consideration of the payment of a sum of 4550*l.*, was in fact gratuitous. At the time of the transfer the deceased had paid fourteen annual premiums and after the transfer he continued to pay the premiums for four more years. Thereafter for the seven following years the premiums were paid by the respondents until the death of the assured on April 23, 1935, when the proceeds of the policy, amounting to 21,800*l.*, were paid over to the respondents. Thus, of the twenty-five premiums paid in all, eighteen were paid by the deceased, fourteen before and four after the transfer of the policy, and seven were paid by the respondents.

The parties were agreed that on the death of the assured estate duty was payable on some part of the proceeds of the policy, but they were at variance as to the appropriate fraction. The Commissioners of Inland Revenue maintained that the correct proportion was four elevenths, and assessed the respondents accordingly. The respondents, maintaining that the correct proportion was four twenty-fifths, appealed to the Court of Session under s. 10 of the Finance Act, 1894. The

learned judges of the First Division by a majority allowed the appeal, the Lord President (Lord Normand) and Lord Moncrieff being of opinion that four twenty-fifths was the correct proportion, while Lord Morison was of opinion that it should be four elevenths. The Crown now asks your Lordships to restore the original assessment on four elevenths.

The question turns on the interpretation of a few words in s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, which in such cases imposed account duty (now represented by estate duty) in the following terms: "The charge . . . shall extend to money received under a policy of assurance effected by any person dying on or after the first day of June one thousand eight hundred and eighty nine on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit."

The present case is one in which the policy was not wholly but only partially kept up by the deceased for the benefit of the donee. In such a case the charge is upon a part only of the proceeds of the policy, such part being proportionate to the premiums paid by the deceased. I agree with the Lord President that this means that the part is to be proportionate to the premiums paid by the deceased for the benefit of the donee. As the Lord President points out: "The premiums which are paid by the assured before there is a donee are paid to keep up the policy for the benefit of his own estate." The obvious truth that a policy cannot be said to be kept up for the benefit of a donee until after the donee has come into existence—that is to say, until after the donation has been made—was the basis of the decision of your Lordships' House in *Lord Advocate v. Fleming* (1) sub nom. *Lord Advocate v. Robertson*. (2) Now the premiums paid by the deceased in the present case to keep up the policy for the benefit of the donee—that is to say, the premiums paid by him after the transfer of the policy to the respondents—were

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(1) [1897] A. C. 145.

(2) 24 R. (H. L.) 42.

H. L. (Sc.) four in number. The parties are agreed that this figure must be the numerator of the fraction. But the Crown say that the proportion should be as four is to eleven, being the number of premiums paid after the transfer, while the respondents say that the proportion should be as four is to twenty-five, being the total number of premiums paid since the policy was originally taken out.

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Three situations may arise where a policy has been transferred by the assured to another party during its currency. First, the assured may pay no further premiums in respect of the policy after its transfer. In that case the sub-section has no application. The policy has ceased on transfer to be an asset of the deceased's estate. The only claim which the Crown could have to estate duty on the death of the assured would be where the transfer had been to a gratuitous donee within three years of the assured's death; that claim would not be under the present sub-section but under quite a different head. The sub-section, as Lord Adam pointed out in *Lord Advocate v. Robertson* (1), applies only "where a policy is wholly or partly kept up by the donor after the date of the assignation." In the case of *Lord Advocate v. Fleming* (2), no premiums were paid by the donor after the date of the assignation. The sub-section consequently had no application and no duty was due, for the policy had never been kept up either wholly or partially by the deceased for the benefit of the donee. In the second place, all the premiums after the assignation may be paid by the donor. The sub-section applies, for the policy has after the assignation been wholly kept up by the donor for the benefit of the donee. In such a case the whole proceeds of the policy are subject to duty. In the third place, as here, some of the premiums after the assignation may be paid by the donor and some by the donee. Here also the subsection applies, for the policy has after the assignation been partially kept up by the deceased donor for the benefit of the donee.

To my mind it is clear from these considerations that the sub-section is concerned only with what happens during the

(1) (1895) 22 R. 568, 574.

(2) [1897] A. C. 145.

period between the assignation of the policy to the donee and the death of the assured. Of the eleven premiums paid during that period in the present case the deceased paid four and the donees paid seven—that is to say, the deceased paid four elevenths and the respondents paid seven elevenths of the premiums falling due during that period. It follows, in my opinion, that the part of the proceeds of the policy which is proportionate to the premiums paid by the deceased within the meaning of the statute is four elevenths. I am fortified in this reading of the sub-section by the fact that it also commended itself to Rowlatt J., who in the case of *Attorney-General v. Meech* (1), said of the sub-section: “I think it “simply means that, where after the assignment what has “kept up the policies has been provided partly by the assignor “and partly by the assignee, the policy moneys are to be “subject to and escape duty in the same proportion.”

Mr. M’Intyre for the respondents, in a concise and admirably reasoned argument, submitted that the appellant’s reading of the sub-section offended against the principle of the *Lord Advocate v. Fleming* (2)—namely, that a policy could not be said to be kept up for a donee when there was no donee in existence. For the appellant’s reading involved this, that a policy kept up by the donor for the benefit of a donee after assignation was wholly kept up for the benefit of the donee within the statutory meaning and the entire proceeds were consequently liable to duty, whereas in point of fact the policy might for many years before assignation have been kept up by the assured for his own benefit. It was wrong to regard a policy as wholly kept up for the benefit of a donee when it had only been kept up for the benefit of a donee during part of its currency. The sound view, therefore, was that a policy was wholly kept up for the benefit of a donee in the statutory sense only when the policy during the whole of its currency was kept up for a donee. Similarly a policy was partially kept up for the benefit of a donee when during part of its currency it was so kept up by the assured. The factors, in striking the proportion, should therefore be (1.) the number

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(1) 15 Annotated Tax Cases 619, 622.

(2) [1897] A. C. 145.

H. L. (Sc.) of premiums paid on behalf of the donee, and (2.) the number of premiums paid during the whole currency of the policy. Otherwise part of the proceeds representing premiums paid when there was no donee in existence would be subjected to duty.

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I appreciate the anomaly, but I fear that there is no reading of this imperfectly drafted sub-section which will avoid all illogicalities. In my view the manner in which the respondents seek to invoke the aid of the case of the *Lord Advocate v. Fleming* (1), is not justified, for the principle of that case, as I understand it, is that you are to have regard only to the period after assignation and ascertain by whom the premiums were paid between the assignation and the death of the assured. If during that period no premium was paid by the donor, the proceeds of the policy escape duty; if all the premiums were paid by the donor, the whole proceeds are subjected to duty; if some of the premiums were paid by the donor, the proceeds are subjected to duty to the extent of the proportion which the number of premiums paid by the donee during that period bears to the total number of premiums paid by the donor and the donee during that period. In short, when the sub-section speaks of keeping up a policy for the benefit of a donee it refers to the period after the donee has come into existence—that is to say, the period after assignation of the policy to the donee, and any consideration of what happened before the assignation is excluded.

I am accordingly of opinion that the appeal should be allowed, that the interlocutor of the First Division of the Court of Session of March 25, 1937, should be reversed, and that your Lordships should declare that the respondents are liable to estate duty in respect of four elevenths of the sum of 21,800*l.* referred to in the appeal.

Appeal allowed.

Solicitors for appellant: *Solicitor of Inland Revenue, for Solicitor of Inland Revenue, Scotland.*

Solicitors for respondents: *Blount, Petre & Co., for Tait & Crichton, W.S., Edinburgh.*

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[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR ONTARIO } AND ANOTHER }	INTERVENERS.	

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario) — Ontario Municipal Board — Primarily an administrative body—Not validly constituted to receive judicial authority—Severability—Powers of examination, inspection and discovery of documents—Ontario Municipal Board Act, 1932 (22 Geo. 5, c. 27), ss. 41-46, 54, 59—Township of York Act, 1936 (1 Edw. 8, c. 88), s. 2—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 96, 99, 100.

In 1916 the respondent corporation entered into an agreement with the appellant corporation whereby the latter agreed to supply water to the respondents on terms including payment at the rate of 20 cents per 1000 gallons. In 1936, on an application by the respondents to the Ontario Municipal Board to vary the rate for water supplied, made pursuant to s. 2 of the Township of York Act, 1936, which provided (inter alia) that notwithstanding the provisions of the agreement of 1916 the Municipal Board should have jurisdiction to vary and fix the rates, and to hear and determine any such application, the Municipal Board made an order directing the appellants to make discovery on oath of documents, authorizing the respondents to enter upon and inspect the appellants' waterworks system, and directing the appellants' Commissioner of Works to submit to be examined upon oath. The appellants having alleged that the Ontario Municipal Board was invalidly constituted to make such an order:—

Held, that the Ontario Municipal Board is primarily, in pith and substance, an administrative body. The members of the Municipal Board not having been appointed in accordance with the provisions of ss. 96, 99 and 100 of the British North America Act, 1867, which regulate the appointment of judges of Superior, District and County Courts, the Board is not validly constituted to receive judicial authority. Assuming that the Ontario Municipal Board Act, 1932, which set up the Board, does by some of its

* *Present* : LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

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sections purport to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is to that extent invalid. There is, however, nothing to suggest that the Board would not have been granted its administrative powers without the addition of the alleged judicial powers, and although, therefore, such parts of the Act of 1932 as purport to vest in the Board the functions of a Court have no effect, they are severable, and the Board is validly constituted for the performance of its administrative functions.

The Municipal Board's powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a Court of Justice, are not inconsistent with the powers of an administrative body whose duty it is to ascertain the facts with which they are dealing.

Further, assuming that the first part of s. 2 of the Township of York Act, 1936, purported to confer a judicial function on the Board, it was inoperative, but the second part related to an administrative function—the varying and fixing of the rate—and was severable. The order made by the Ontario Municipal Board was accordingly valid.

Proprietary Articles Trade Association v. Attorney-General for Canada [1931] A. C. 310, and *O'Connor v. Waldron* [1935] A. C. 76, referred to.

Judgment of the Court of Appeal for Ontario [1937] O. R. 177, affirmed.

APPEAL (No. 37 of 1937), by special leave, from a judgment of the Court of Appeal for Ontario (December 4, 1936), dismissing an appeal from an order of the Ontario Municipal Board (September 23, 1936).

In 1916 the respondents, the Corporation of the Township of York, entered into an agreement with the appellants, the City of Toronto Corporation, whereby the appellants agreed to supply water to the respondents on terms, including payment at the rate of 20 cents per 1000 gallons. The agreement, which contained a provision that the rate might be altered by agreement or by arbitration, was confirmed by an Act of the Ontario Legislature, 1917 (7 Geo. 5, c. 98). In 1936, that Legislature passed the Township of York Act (1 Edw. 8, c. 88), which by s. 2 provided that notwithstanding the provisions of the agreement of 1916, “either party to the said “agreement may from time to time apply to the Ontario “Municipal Board to vary the rates to be charged for water “supplied by the said City Corporation under the terms of “the said agreement or to settle any differences arising

"between the parties to the said agreement as to the construction thereof, or as to any matters relating to or arising out of the agreement, and the Ontario Municipal Board shall have jurisdiction to vary and fix the said rates, and to hear and determine any such application, and the decision of the said Board on any such application shall be final and conclusive and shall not be subject to appeal."

An application was made by the respondents to the Municipal Board in pursuance of that Act to vary the rate for water supplied, and it was in respect of that application that the Municipal Board made the order now complained of, ordering the appellants to make discovery on oath of documents, authorizing the respondents to enter upon and inspect the appellants' waterworks system, and directing the appellants' Commissioner of Works to submit to be examined upon oath touching his knowledge of the matters in question.

In answer to the application the appellants pleaded (inter alia) that s. 2 of the Township of York Act, 1936, was ultra vires the Legislature of Ontario, and that the Ontario Municipal Board had no jurisdiction to hear the application or to vary the rates, and that the members of the Municipal Board had no jurisdiction to make and enforce the order, not having been appointed by the Governor-General in accordance with the provisions of s. 96 of the British North America Act, 1867.

The Court of Appeal for Ontario (Rowell C.J.O., Riddell, Middleton, Fisher and Henderson JJ.A.) held that the order was valid, though they were also of opinion that the Act conferring jurisdiction was in part ultra vires as an attempt to confer judicial powers on the Municipal Board, but that such part was severable from that part which related to an administrative function—the power to vary and fix the rates. The appeal is reported at [1937] O. R. 177.

1937. Nov. 26, 29, 30; Dec. 2. *W. N. Tilley K.C.* and *C. M. Colquhoun K.C.* (both of the Ontario Bar) for the appellant corporation. This appeal raises questions as to the jurisdiction of commissions appointed to do mainly administrative acts, but having coupled with those powers exceptionally

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broad powers of a judicial character. In 1906 the Ontario Legislature set up the Ontario Railway and Municipal Board, the predecessor of the present Ontario Municipal Board, and the question has frequently arisen in Ontario whether all the powers entrusted to the former Board could be exercised by members appointed by the Provincial Legislature, or whether it was necessary that, to exercise some of the powers, they should be Dominion appointees. The same question arose in respect of the present Municipal Board, which was set up by the Ontario Municipal Board Act, 1932. That Act, it is submitted, confers judicial functions on the Board, the members of which are not appointed by the Governor-General as required by s. 96 of the British North America Act, 1867, and is ultra vires the Provincial Legislature. [Reference was made to the British North America Act, 1867, ss. 96, 99, 100; the Ontario Municipal Board Act, 1932; and the Township of York Act, 1936, s. 2.] The particular order made raised the whole question of the validity of the Boards' proceedings. It is not contested that even an administrative body can, if the legislation is appropriate, require many things to be done by the parties in order that the body may better perform their administrative duties. The question in this case is whether the Board is exercising administrative or judicial functions. If the members of the Board were appointed and paid by the Dominion, the present objection could not have been raised. Some Parts of the Ontario Municipal Board Act, 1932, are severable; but Part III. and Part VIII., which deal respectively with "General Jurisdiction and Powers" and "Practice and Procedure," and are the material Parts, are not severable. Those provisions appear to confer on the Board powers similar to those of a Superior Court; the Board has everything appertaining to a Superior Court except the judge.

Sect. 2 of the Township of York Act, 1936, which attempts to confer additional jurisdiction on the improperly constituted Board, cannot in any circumstances be severed, and that section is itself ultra vires as conferring judicial powers on the Board. The rules made by the Municipal Board under the Act

of 1932 regulating its practice and procedure relate to the exercise of its judicial rather than to any administrative functions vested in it. [Reference was then made to the following authorities on the question of the exercise of judicial and administrative functions: *Polson Iron Works v. Munns* (1); *Colonial Investment & Loan Co. v. Grady* (2); *Winnipeg Electric Ry. Co. v. City of Winnipeg* (3); *Small Debts Recovery Act, Re* (4); *Toronto R. W. Co. and City of Toronto, Re* (5); *Toronto Ry. Co. v. Toronto City* (6); *McLean Gold Mines, Ltd., and Attorney-General for Canada, Re* (7); *Welland, County of, Re* (8); *Roskiwich v. Roskiwich* (9); *Clubine v. Clubine* (10); *The King ex rel. The Township of Stamford v. McKeown et al.* (11); *Shell Co. of Australia v. Federal Commissioner of Taxation* (12); and *O. Martineau & Sons, Ltd. v. Montreal City*. (13) On the question of severance reference was made to *Initiative and Referendum Act, In re* (14); *Attorney-General for British Columbia v. Attorney-General for Canada* (15); *Attorney-General for Manitoba v. Attorney-General for Canada* (16); *Attorney-General for Canada v. Attorney-General for Ontario* (17); *Attorney-General for British Columbia v. Attorney-General for Canada* (18); and *Attorney-General for Ontario v. Attorney-General for Canada*. (19)]

Frank Gahan for the Attorney-General for Canada, intervening, supported the appeal of the Toronto Corporation, and adopted the argument of *W. N. Tilley K.C.*

Gershom W. Mason K.C. (of the Ontario Bar) for the respondent corporation. The Ontario Municipal Board has jurisdiction over three matters: (a) Provincial railways; (b) Municipalities; and (c) Public utilities; and when the

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| (1) (1915) 24 D. L. R. 18, 21. | (10) [1937] O. R. 636. |
| (2) (1915) 24 D. L. R. 176. | (11) [1934] O. R. 662; [1935] |
| (3) (1916) 30 D. L. R. 159, 174, | O. R. 109. |
| 178. | (12) [1931] A. C. 275, 294. |
| (4) (1917) 37 D. L. R. 170. | (13) [1932] A. C. 113, 115. |
| (5) (1918) 44 O. L. R. 381, 387, | (14) [1919] A. C. 935. |
| 397. | (15) [1924] A. C. 203. |
| (6) [1920] A. C. 446, 454. | (16) [1925] A. C. 561. |
| (7) (1923) 54 O. L. R. 573. | (17) [1937] A. C. 355. |
| (8) (1933) Ont. W. N. 470. | (18) [1937] A. C. 377, 385, 387. |
| (9) [1932] 1 D. L. R. 135. | (19) [1925] A. C. 750. |

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language of the Act of 1932 appears in some places to be general it must be read having regard to the fact of what the jurisdiction clearly consists : *Fielding v. Thomas*. (1) If there has been any exercise of judicial power, then this case is the same as *O. Martineau & Sons, Ltd. v. Montreal City* (2)—it is a power that does not take away from the functions of the Superior Court as it existed at Federation. In the following Acts, under which substantial powers are conferred on the Municipal Board, there is no trace of anything in the nature of judicial, it is all purely administrative : Assessment Act, R. S. O., 1927, c. 238 ; the Public Commercial Vehicle Act, 1933, S. O., c. 49 ; the Public Vehicle Act, 1933, S. O., c. 53 ; and the Public Utilities Act, R. S. O., 1927, c. 249, ss. 52, 64. Those Acts show that in all matters connected with railways, municipalities and public utilities very wide powers were given to the Board as to the field in which it functions. The real intent of the impugned legislation, it is submitted, was never to create a judicial body at all, but to create an administrative one, and then it was necessary to enable it to function properly that it should have certain powers, and the powers which have been given to it are in part powers which would normally be exercised by a Court. An administrative body does not, however, in such circumstances become a Court : the powers, so far as they relate to administration, are those of the executive. In pith and substance the Ontario Municipal Board is an administrative body.

The Municipal Board is not assuming the functions of a Superior Court as such a Court is contemplated in the British North America Act : the Board created by the Legislature of the Province and exercising the power given it by s. 2 of the 1936 Act to vary and fix the water rates is not functioning in such a manner as to usurp the jurisdiction of a Superior, District, or County Court, because no Court ever had jurisdiction to set aside a contract between parties and impose terms upon them which they had not contracted for. A Province has a right to constitute, organize and maintain a Court, provided that it does not transgress against the provisions of ss. 96, 99 and

(1) [1896] A. C. 600.

(2) [1932] A. C. 113.

100 of the British North America Act. With regard to arbitration and the suggestion that judicial functions are there exercised, the only kind of arbitration which the Board deals with arises under a statute—where lands are taken for some public purpose and the Municipal Board is nominated to fix compensation: exactly the same position arose long before Confederation.

[The following authorities were cited as bearing on various aspects of the foregoing argument: *Rimmer v. Hannon* (1); *Smith v. City of London* (2); *Fielding v. Thomas* (3); *O'Connor v. Waldron* (4); *Board of Education v. Rice* (5); *Attorney-General for Quebec v. Slanec & Grimstead* (6); *City of Winnipeg v. Winnipeg Electric Ry. Co.* (7); *Toronto Ry. Co. v. Toronto City* (8); *Winnipeg Electric Ry. Co. v. City of Winnipeg* (9); *Township of Sandwich East v. Union Natural Gas Co.* (10); *Dominion Cannery v. Costanza* (11); *Solloway Mills & Co., Ltd., in Liquidation, Re. Ex parte I. W. C. Solloway* (12); and *Toronto R. W. Co. and City of Toronto, Re.* (13)] There are powers given by the Ontario Municipal Board Act, 1932, which are dissimilar to those of a Court; it was never intended that the body should sit as a Court, and it does not interfere with or take away from the functions of the Courts. In *Shell Co. of Australia v. Federal Commissioner of Taxation* (14) the fixing of an assessment was held not to involve the exercise of any judicial power, and the fixing of a rate is clearly of the same nature.

With regard to severability, any portions of s. 2 of the Township of York Act, 1936, which may be open to objection, are severable from the rest of the section—everything can be excluded except the part relating to the fixing of the rates. [On the question of severability reference was made to *Attorney-*

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(1) (1921) 60 D. L. R. 637, 640.

(2) (1909) 20 O. L. R. 133, 154.

(3) [1896] A. C. 600, 612.

(4) [1935] A. C. 76, 81, 82.

(5) [1911] A. C. 179, 182.

(6) [1933] 2 D. L. R. 289, 327.

(7) (1920) 54 D. L. R. 445, 452,

(9) (1916) 30 D. L. R. 159.

(10) (1924) 56 O. L. R. 399;

(1925) 57 O. L. R. 656.

(11) [1923] Can. S. C. R. 46, 54.

(12) [1935] O. R. 37, 43.

(13) (1918) 44 O. L. R. 381, 388,

390, 394.

(14) [1931] A. C. 275, 297.

(8) [1920] A. C. 446, 455, 458.

J. C. *General for Ontario v. Attorney-General for Canada* (1);
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 CORPORATION *Trustees* (8); 59 *Corpus Juris*, p. 642, s. 206; *Rex v. Company*
 of *Fishermen of Faversham* (9); and *Great West Saddlery Co. v.*
 The *King* (10).] On the jurisdiction of the Courts to declare
 an assessment illegal see *City of Ottawa v. Wilson*. (11)

There is a distinction between judicial functions and judicial powers. By "functions" is meant the field of subject-matter in which the Court or Board operates. "Powers" imports the power of the Court to grant injunctions or to do something of that character. Of the functions of the Municipal Board there is in no case any taking away from the jurisdiction of the Courts by the powers that were vested in the Board. For the purpose of convenience certain powers, as distinct from functions, that are normally vested in a Court, have been given to the Board; but only as incidental to and as appropriate machinery for the exercise of administrative functions. In pith and substance the whole of the legislation in question constitutes an administrative tribunal, and there is nothing in the thirty-one years' history of this Board and its predecessor to suggest that it has acted arbitrarily or as a Court.

The powers necessary for the making of the order in question are proper powers for an administrative Board. The practice with regard to examination and discovery is growing widely in Canada. Powers of the character in question existed in Boards which were not Courts before Confederation: *Reg v. Coote*. (12) The nature of the powers in the Fire Marshals

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| (1) [1925] A. C. 750, 753. | (7) (1908) 211 U. S. 45. |
| (2) [1923] A. C. 450, 454. | (8) (1900) 179 U. S. 472, 490. |
| (3) [1896] 1 Q. B. 290, 292. | (9) (1799) 8 T. R. 352. |
| (4) (1868) L. R. 3 C. P. 235. | (10) [1921] 2 A. C. 91, 119. |
| 250. | (11) [1933] O. R. 21, 24. |
| (5) (1881) 7 Q. B. D. 32, 36-7. | (12) (1873) L. R. 4 P. C. 599, |
| (6) (1886) 11 App. Cas. 627, | 604-5. |
| 634. | |

for Montreal and Quebec Act, 1868 (31 Vict. c. 32 (Quebec)), were as great or greater than those given to this Board. [Reference was also made to Holmsted's Judicature Act, 4th ed., p. 797, r. 327; p. 807, r. 331; p. 811, r. 333; p. 815, r. 341; p. 822, r. 345; p. 825, r. 348; and p. 850, r. 349; and to *St. John v. Fraser*. (1)] In this case the statutes have expressly given the power to do what was sought to be done, whereas in *Huish v. Liverpool Justices* (2) and *Sutton v. Great Northern Ry. Co.* (3) the point was whether the statutes did give the jurisdiction sought to be exercised.

Salter A. Hayden K.C. for the Attorney-General for Ontario adopted the argument on behalf of the respondents, upholding the validity of the Ontario Municipal Board Act, 1932. Sect. 44 (c) and s. 54 were sections which might be said to enlarge the jurisdiction of the Board to such an extent that it became, if not a Court, very like one. If s. 44 (c) is read by itself, and without relation to any other provisions of the Act, and without regard to any limitations which may be inherent in it, it undoubtedly gives to the Board powers very much as a Court in a certain field. It is suggested, however, that s. 44 (c) and s. 54 must be read in the context with the limitation imposed on them by the other sections of the Act: *Macleod v. Attorney-General for New South Wales*. (4) Once it is accepted that the purpose of the Act of 1932 is to set up an administrative tribunal, it is submitted that s. 44 (c) is only administrative machinery to enable the Board to do that which it has jurisdiction to do. [Reference was also made to ss. 41, 42 and 43 of the Ontario Municipal Act, 1932, and to *Toronto Ry. Co. v. Toronto City*. (5)]

The Act of 1932 was not a colourable attempt to encroach on the exclusive power of the Dominion under s. 96 of the British North America Act to appoint judges. The Act can be severed if what remains can survive the operation: *Lymburn v. Mayland*. (6) The Board could continue to function and operate just as well without as with s. 44 (c)

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(1) [1935] Can. S. C. R. 441, 454.

(2) [1914] 1 K. B. 109, 116.

(3) [1909] 2 K. B. 791, 797.

(4) [1891] A. C. 455, 457.

(5) [1920] A. C. 455, 461.

(6) [1932] A. C. 318, 327;

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and s. 54. The same argument as to severance applies to s. 2 of the Township of York Act, 1936.

Tilley K.C. replied. The Province is entirely prohibited from entering the Dominion legislative field: *Alberta Railway Act, In re.* (1) The ambit of the administrative powers must not include the power as between the parties to determine the legal effect of documents. [Reference was made to *Canadian Pacific Ry. Co. v. Grand Trunk Ry. Co.* (2) and *Sutton v. Great Northern Ry. Co.* (3), and on the position of a Court of Record to *Kemp v. Neville* (4) and *Reg. v. Corporation of Maidenhead.* (5)] Either the Board was not properly constituted by the original Act of 1906, or, in the alternative, some of the sections of the Act of 1932 are designed to create a Court and to give the Board all the powers of the judges of a Court, and they must therefore be held ultra vires, and the order in question cannot operate. No sufficient reason has been given for severing what has been called the invalid part of s. 2 of the Township of York Act, 1936, from the other part.

1938. Jan. 24. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the Court of Appeal of Ontario dismissing an appeal from an order of the Ontario Municipal Board which ordered the appellants to make discovery of documents and to permit inspection of their waterworks system, and ordered the appellants' Commissioner of Works to be examined on discovery. The Board made the order in pursuance of powers contained in the Ontario Municipal Board Act, 1932, and in the course of an application brought before them by the respondents, the Corporation of the Township of York, in pursuance of the Township of York Act, 1936. The contentions of the appellants are: (1.) that the Board is invalidly constituted as being a Superior Court constituted in violation of ss. 96, 99 and 100 of the British North America Act; (2.) that in any case the power to make the order in question is one that could only be exercised by

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| (1) (1913) 48 Can. S. C. R. 9; | (4) (1861) 10 C. B. (N. S.) 523. |
| [1915] A. C. 363. | (5) (1882) 8 Q. B. D. 339, 352; |
| (2) (1914) 49 Can. S. C. R. 525. | 9 Q. B. D. 494, 500. |
| (3) [1909] 2 K. B. 791, 796. | |

such a Court ; and (3.) that the Act of 1936 is invalid as purporting to vest the jurisdiction of a Superior Court in the Municipal Board.

A short statement of the circumstances leading to the dispute between the parties will suffice. In 1916 the Township entered into an agreement with the City whereby the City agreed to supply water to the Township on terms, including payment at the rate of 20 cents per 1000 gallons. The agreement contained a provision that the rate might be altered by agreement or by arbitration. An arbitration clause provided for arbitration by two officials of the respective corporations, and in the event of disagreement by a County Court judge. The agreement was confirmed by a Statute of Ontario, 1917 (7 Geo. 5, c. 98). In 1936 the Legislature of Ontario passed the Township of York Act, 1936 (1 Edw. 8, c. 88), which provided in s. 2 that notwithstanding the provisions of the agreement of 1916: "either
 "party to the said agreement may from time to time apply
 "to the Ontario Municipal Board to vary the rates to be
 "charged for water supplied by the said city corporation
 "under the terms of the said agreement or to settle any
 "differences arising between the parties to the said agreement
 "as to the construction thereof, or as to any matters relating
 "to or arising out of the agreement, and the Ontario Municipal
 "Board shall have jurisdiction to vary and fix the said rates,
 "and to hear and determine any such application, and
 "the decision of the said board on any such application
 "shall be final and conclusive and shall not be subject to
 "appeal."

Application was made by the Township to the Municipal Board in pursuance of this Act to vary the rate for water supplied, and it was in respect of that application that the order complained of was made.

It will be seen that the attack of the appellants is two-fold. They dispute the validity of any act of the Municipal Board as at present constituted, and if this contention fails, they attack the validity of the Act of 1936.

The first question touches a matter of first importance to

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the people of Canada. While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province, the independence of the judges is protected by provisions that the judges of the Superior, District, and County Courts shall be appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined. Is, then, the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted.

But a study of the provisions of the Municipal Board Act read in the light of its history as a successor to the Ontario Railway and Municipal Board (see ss. 6 and 7) leads their Lordships to the conclusion that the Board is primarily, in "pith and substance," an administrative body. Parts IV., V., VI. and VII. are almost entirely administrative, and though some of them are now repealed, and the duties of the Board transferred to other administrative channels, their existence assists to reveal the original legislative intention. Mr. Gershom Mason, in his argument for the respondents, gave a survey of the multifarious administrative duties which from time to time had been imposed upon the Board and its predecessor by legislation of the Province. It is unnecessary to review the statutes; it is sufficient to say that in respect of Municipal Institutions, Highways, Railways, Public Utility Acts dealing with Water, Gas and Electricity, Telephones, and apparently other matters as well, the Board is entrusted with duties of supervision and decision which are purely administrative, and in their totality would appear to make it one of the most important parts of administrative machinery in the Province. Primarily, as has been said, its function is

administrative. But Mr. Tilley, for the appellants, emphasized with much force the provisions in Part III. of the Act, especially ss. 41-46, 54 and 59, as indicating that the Board was entrusted with the jurisdiction and powers of a Superior Court, and within the purview of those sections was in fact constituted a Superior Court. It is difficult to avoid the conclusion that, whatever be the definition given to Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But, making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative body ; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority ; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is pro tanto invalid ; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers ; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit ; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect. They are, however, severable ; there is nothing to suggest that the Board would not have been granted its administrative powers without the addition of the judicial powers complained of. The objection to the validity of the Board as such therefore fails. Their Lordships have found it unnecessary to discuss in detail how far some of the powers alleged to be judicial are in fact merely administrative. The question does not arise in the present case, and, in accordance with their Lordships' usual practice

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in constitutional matters, they will not embarrass future discussion when, if ever, such a dispute arises.

The remaining parts of the case seem to present little difficulty. The powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a Court of Justice, are not inconsistent with the powers of an administrative body whose duty it may be to ascertain the facts with which they are dealing. The powers in this case seem to be in substance identical with those in the Combines Investigation Act, R. S. C. 1927, c. 26, the validity of which was affirmed in *Proprietary Articles Trade Association v. Attorney-General for Canada* (1), and the existence of which was held not to make a commissioner armed with them a Court of Justice in *O'Connor v. Waldron*. (2) The only remaining question is whether the Act of 1936 was valid. Their Lordships agree with the judgment of the Chief Justice of Ontario on this point. Assuming that the first part of the section purports to confer judicial function on the Board, it is clearly inoperative; but the second part relates to an administrative function, and appears to their Lordships clearly severable. The result is that the order complained of was a valid order. The order of the Court of Appeal affirming it was right, and this appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of this appeal.

Solicitors for appellants: *Freshfields, Leese & Munns.*

Solicitors for respondents: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Ontario: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

(1) [1931] A. C. 310.

(2) [1935] A. C. 76.

[PRIVY COUNCIL.]

NIPPON YUSEN KAISHA APPELLANTS ; J. C.*

AND

RAMJIBAN SEROWGEE RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

India—Shipping—Bills of lading—Issued to shipper of goods without production of mate's receipts—Indemnity taken—Mate's receipts, in name of shipper, held by vendor of goods against payment by shipper—Payment not made—Goods disposed of by shipper—Vendor's equitable lien—Claim against shipowner—Conversion.

The respondents, having entered into contracts with certain mills for the purchase of a quantity of bales of gunnies, sold the like quantity on the same day to a company who, in due course, booked freight space with the appellants, shipowners, for carriage of the goods to Japan on two of their vessels. The shipping order stipulated that the mate's receipts must be exchanged for bills of lading. All the contracts—of purchase and re-sale—provided for delivery free alongside export vessel at Calcutta, and contained conditions that payments were to be made in cash in exchange for mate's receipts, and that, so long as the mate's receipts were in possession of the sellers, the lien of the sellers, as unpaid vendors, subsisted both on the mate's receipts and the goods they represented until payment in full.

The company gave shipping instructions to the respondents, who passed them on in the same terms to the mills, and in due course the goods were shipped, and the mate's receipts therefor, in the name of the company as shippers, were delivered to the mills' representatives. On the same and the following day, however, the appellants, having taken a letter of indemnity from the company, issued to the company the respective bills of lading without the mate's receipts being given in exchange. A few days later the respondents, having paid the mills for the goods, obtained possession of the mate's receipts, which they then tendered to the company, but the latter defaulted in payment. The respondents thereupon notified the appellants in writing that they had an unsatisfied lien or claim for the price of the goods and were entitled to retain the relative mate's receipts, and that bills of lading must not be issued until the mate's receipts were surrendered to them (the appellants). By that time, however, the company, having the bills of lading in their possession, had re-sold the goods to purchasers in Japan, to whom they were subsequently delivered by the appellants on presentation of the bills of lading.

* *Present* : LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, LORD NORMAND (Lord President, Court of Session), and SIR SHADI LAL.

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On a claim by the respondents against the appellants for (inter alia) damages :—

Held, first, that the sale being of unascertained goods the property in them passed under the contract when the goods were appropriated by delivery alongside the vessel. The respondents had then parted with both property and possession, and the lien they held was therefore an equitable and not a common law or possessory lien, and was only enforceable by equitable remedies against the company. All that the respondents had was possession of, or a lien on, the mate's receipts, which was not a document of title to the goods shipped. Although *prima facie* the possessor of the mate's receipts is entitled to have the bills of lading issued to him, where in fact the mate's receipts acknowledged receipt from the company, who had contracted for the freight, and the property in the goods was in the company, the appellants were *prima facie* bound to deliver the bills of lading to the company.

Principle in *Hathesing v. Laing* (1873) L. R. 17 Eq. 92, applied.

There had been no timeous express notice to the appellants, or any ground for imputing implied notice, not to issue bills of lading, and the case was one in which the appellants, who for their own protection had stipulated with the shippers that bills of lading were to be given in exchange for mate's receipts, had waived that provision, and without notice had issued bills of lading to the named shippers and owners of the cargo, and in such circumstances they could not be held responsible.

Held, further, on the footing that the bills of lading were delivered to the company, that the holding of the mate's receipts by the respondents only gave them an equitable lien which did not affect the transferee of the bills of lading so as to found a claim for conversion.

Pease v. Gloahec (1866) L. R. 1 P. C. 219, referred to.

Decree of the High Court in its appellate jurisdiction reversed.

APPEAL (No. 36 of 1937) from a decree of the High Court in its civil appellate jurisdiction (March 18, 1936), reversing a judgment and decree of the same Court in its original civil jurisdiction (July 16, 1929).

On May 4, 1926, the respondents, Ramjiban Serowgee, brokers and merchants of Calcutta, entered into three contracts with three mills respectively for the purchase of 250 bales of gunnies. On the same day the respondents sold the same quantity of 250 bales to the International Export Company, Limited (hereinafter called the "Export Company"). The conditions of all the contracts were identical, the form used being the ordinary form approved by the Indian Jute Manufacturers Association. Clause 3 of the terms and

conditions provided that "Payments to be made in cash "in exchange for mates' receipts (which are "to be handed to the seller's representatives)"; and by clause 4: "The buyers hereby acknowledge that "so long as such mates' receipts (whether in sellers' "or buyers' name) are in possession of the sellers, the lien "of the sellers as unpaid vendors subsists both on such mates' "receipts and the goods they represent until payment in "full." The contracts stipulated for delivery free alongside export vessel in the port of Calcutta.

The Export Company booked freight space with the appellants, Nippon Yusen Kaisha, shipowners, and it was stipulated in the shipping order (inter alia) that the mate's receipts must be exchanged for bills of lading. On May 4, 1926, the Export Company gave shipping instructions to the respondents, which they passed on in the same terms to the three mills, and in due course the goods were sent on board two of the appellants' vessels for conveyance to Kobe, Japan, and mates' receipts, in the name of the shippers, the Export Company, were delivered to the mills' sircars on May 17, 18, 24 and 25. The appellants forthwith issued the respective bills of lading to the Export Company without the mates' receipts being given in exchange, but a letter of guarantee or indemnity was taken from the Export Company by the appellants.

The respondents obtained the mates' receipts from the mills against payment for the goods, and then tendered the mates' receipts to the Export Company, who defaulted in payment. Thereupon the respondents, on May 27, 1926, notified the appellants in writing that they had an unsatisfied lien or claim for the price of the goods, and that bills of lading must not be issued by the appellants until the mates' receipts had been surrendered to them. By that time, however, the Export Company, having the bills of lading in their possession, had resold the goods to purchasers in Japan, and had drawn bills of exchange for the price on the purchasers, which bills they had discounted with the International Banking Corporation and had endorsed the bills of lading to that Bank by way

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of security. The goods were in due course delivered by the appellants to the purchasers on presentation of the bills of lading.

On June 12, 1926, the respondents issued a writ, claiming as against the appellants (inter alia) a declaration that they were entitled to stop the goods and take delivery of them, and in the alternative, and as against the appellants and the Export Company, they claimed Rs. 54,000, the price of the goods.

The facts appear more fully from the judgment of the Judicial Committee.

The Export Company did not appear at the trial and judgment was entered against them by default.

The trial judge (Buckland J.) dismissed the suit as against the appellants. On appeal by the respondents the High Court in its appellate jurisdiction (Derbyshire C.J., Costello and Panckridge JJ.) allowed the appeal, and the present appellants were directed to pay to the respondents Rs. 49,625, the agreed amount of the damages. The reasons for the decision of the trial judge and of the Appellate Court appear from the judgment of the Judicial Committee.

1938. Feb. 14, 15, 17. *Sir Robert Aske K.C.* and *W. Lennox McNair* for the appellants. The scheme of the contract is that the seller places the goods alongside the ship, and when he has done that the property passes to the buyer. If the respondents had wished to retain the property they could have done so in various ways: they could have had the mates' receipts made out in their own name; they could have required the ship to issue bills of lading in the name of the sellers. The most important part of the contract as indicating intention is the fact that the respondents stipulated for a contractual lien, which could not exist if the property were still in them. They therefore knew that on delivery of the goods alongside the ship on shipping instructions notified to the ship that the contracts were made with the ship by the Export Company, and the mates' receipts being in the name of that company, that the only right of the ship was

to issue bills of lading in the same name as the mates' receipts. The appellants had no right to issue a bill of lading in any other name, and therefore the general property in the goods passed. At the time the mates' receipts were given and the bills of lading were issued the respondents had neither possession of the goods nor of the mates' receipts, and they had no right to possession of either. They had merely a contractual right against the Export Company.

The first matter is whether the ship was under any obligation to the respondents with regard to the issue of the bills of lading, and that falls into two branches: (a) what is the general law with regard to the duty of a ship in issuing bills of lading? and (b) how are those general principles to be applied to the respondents who, it is submitted, have no contractual right as against the ship. It is stated in Scrutton on Charterparties and Bills of Lading, 13th ed., at p. 172, that: "The mate's receipt is also a recognition of "property in any person named therein as owner "The master will therefore be justified in delivering bills of "lading to such a person; or to a person proved to be owner "of the goods, even though the mate's receipt is not produced, "if he has received no notice of other claims" The position has always been regulated by *Hathesing v. Laing*. (1) *Evans v. Nichol* (2) shows that where a mate's receipt is issued in the name of a particular person the ship is estopped from issuing the bill of lading to any one else, and must issue it to the person named in the receipt. Further illustrations in this connection are *Craven v. Ryder* (3), and *Cowas-Jee v. Thompson*. (4) The Court of first instance and the Appellate Court were right, it is submitted, in holding that the appellants did not act wrongfully in issuing the bill of lading to the person named in the mates' receipts—the Export Company.

The next question is, had the respondents any property in the goods, either generally or specially, which would enable them to maintain an action of trover against the appellants? If the Board decide that point in favour of the appellants

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(1) (1873) L. R. 17 Eq. 92.

(3) (1816) 6 Taunt. 433.

(2) (1841) 3 Man. & G. 614, 619.

(4) (1845) 5 Moo. P. C. 165.

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that would dispose of the appeal. If, contrary to the appellants' submission, it is decided that the respondents have a sufficient right of property to maintain trover, then the question arises as to where is the better title to receive the goods. Is that title in the respondents by virtue of these contractual terms, or is it in the bank who are endorsees of the bills of lading? It is submitted that the first point should be decided in favour of the appellants on the ground that the respondents never had anything other than a personal right, which was enforceable by injunction, to restrain the Export Company from dealing with the goods contrary to their agreement with the respondents. If their right was in truth of that character then they had no title to maintain trover.

[Reference was made to *Sewell v. Burdick* (1); *Howes v. Ball* (2); and *Official Assignee of Madras v. Mercantile Bank of India, Ltd.* (3)] It is submitted on those authorities that, even in a case where, as in the *Mercantile Bank of India* case (3) and in *In re Hamilton Young & Co.* (4), which this Board approved in the *Mercantile Bank of India* case (3), there was a letter of hypothecation of the documents of title, and those documents were deposited by way of security, there is no right other than one to enforce the contract by injunction.

The shipowner must, in accordance with the most the authorities lay down, deliver to the person who has the immediate right to possession. A person with merely an equitable right in the goods cannot ask the shipowner to deliver the goods to him at his peril—there is no authority for such a proposition. The only right of a plaintiff claiming some interest in the goods as against a carrier is the right to sue in conversion, and since that right depends either on actual possession or the right to immediate possession, and the plaintiffs in this case, it is

(1) (1884) 10 App. Cas. 74, 95-6.

(2) (1827) 7 B. & C. 481.

(3) [1935] A. C. 53, 58, 64; L. R. 61 I. A. 416.

(4) [1905] 2 K. B. 772.

submitted, had neither, the only remedy which might in certain circumstances have been available against the carrier is not open to the respondents in this case.

On the question as to where the onus of proof lay to prove that the appellants acted in good faith reference was made to s. 178 of the Indian Contract Act, IX. of 1872; to *Whitehorn Brothers v. Davison* (1); *Official Assignee v. Khoo Saw Cheow* (2); *Pope v. Official Assignee, Rangoon* (3); *Bhup Narain Singh v. Gokhul Chand Mahton* (4); *Gobind Chunder Sein v. Ryan* (5); and *Heap v. Motorists' Advisory Agency, Ltd.* (6)] The foregoing are the authorities on "onus," but it is submitted that it is unnecessary for the appellants to rely on the Factors Acts at all: reliance is placed on the common law right. [Reference was also made to *Lickbarrow v. Mason*. (7)] Finally, there is no evidence of any knowledge on the part of the appellants of the particular clauses of the contract in question, or of the respondents' interest in the goods; indeed, the evidence is that the appellants did not know the respondents at all.

A. M. Dunne K.C. and *J. M. Pringle* for the respondents. As between the sellers and the buyers—the respondents and the Export Company—there is no doubt that the basic reason for the incorporation of clauses 3 and 4 in the contract was to ensure that bills of lading should be issued only on the production of the mate's receipts. That is the basis of the transaction. The moment that system was changed by the ship issuing the bills of lading the whole of the sellers' contract with the buyers was gone. If a lien must import possession, it is submitted that the possession must remain in the sellers. In this trade in gunnies shipowners know perfectly well the terms of the contract between the buyers and the sellers. The duty of the ship to the sellers arises in consequence of the knowledge of the shipowners of the usage of the trade in regard to deliveries under those contracts,

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(1) [1911] 1 K. B. 463, 481, 487.

(2) [1931] A. C. 67, 70-1.

(3) (1933) L. R. 60 I. A. 362, 364.

(4) (1933) L. R. 61 I. A. 115, 122.

(5) (1861) 9 Moo. I. A. 140, 160.

(6) [1923] 1 K. B. 577, 589.

(7) (1787) 2 T. R. 63.

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and of the rights of the parties arising out of the possession of the mate's receipts. The sellers have, as long as the mate's receipts are in their possession, a right to the possession of these goods under the lien. They have a lien both on the goods themselves and on the mate's receipts, which represent the goods, until payment in full. It is impossible, on the true construction of the contract, to suggest that on the goods being placed alongside and the mate's receipts being received, the possession has passed to the buyers so that there could be no lien at all. If possession has not been given, the property will not have been passed. It must be either delivery of possession or payment which passes the property under the Indian Contract Act. The mate's receipts had to be taken by the buyers before they could get bills of lading. Under those circumstances it is submitted that it is not at all a question of there being a mere equitable right left in the sellers. The right to immediate possession remains in them under the provision for the lien. Neither possession nor property had passed. Assuming that the buyers did get possession, the possession which they obtained by reason of the delivery of the goods to the ship in their name, was a possession which they held for the sellers. The buyers have acknowledged the sellers' lien upon the goods, and it is submitted that if a lien imports possession in the person claiming the lien, it must be a fair construction of the contract that the possession which the buyers had got from the sellers was not intended to pass the property out and out to them, but was possession for the sellers' benefit. That is a reasonable construction of the contract. There remained in the sellers a special property; they had not parted with possession.

Next, there was in fact a duty on the appellant shipping company not to part with the bills of lading to the buyers until production of the mates' receipts. In breach of that duty they handed to the buyers, without any notice to the sellers, bills of lading without production of the mates' receipts. It makes away with the whole of the property, and the sellers' protection under the standardized contract

is gone. The appellants owed a special duty under the circumstances of this trade not to issue bills of lading without the production of the mate's receipts: *Nippon Yusen Kaisha v. Mahaliram Ramjidas*. (1) The appellants were aware of the usage and custom of this trade in gunnies in Calcutta—that the mate's receipts were to be handed by the ship to the seller, and were to constitute in the hands of the seller a right to payment from the buyers—the shippers—and that the buyers could only get the bills of lading upon production of the mate's receipts. That would ensure the rights of the sellers under the contract and the lien.

[Reference was made to the evidence dealing with the question of custom.]

Hathesing v. Laing (2) lays down a general proposition that the master or shipowner, unless he has notice of a prior claim, is entitled to issue bills of lading to a shipper whose name alone comes before him in connection with the transaction. The appellants in the present case say that therefore the master was justified, even if he had not got the mate's receipts, unless he had notice of somebody else's claim against the shipper, in issuing the bills of lading. The generality of the rule in *Hathesing v. Laing* (2) must be admitted, but the only question in the present case is whether the circumstances are such that they impute the knowledge to the shipowners that in the sellers' interest they should not issue bills of lading to a person who has not the mate's receipts. That knowledge must be imputed to the appellants for the following reasons: (a) They must be understood to have knowledge of the terms of the contract in the trade under which there is the system of placing alongside by the sellers, which gives them (the sellers) the right to have the mate's receipts. (b) By the shipping order which the buyers obtained from the shipping company to hand to the master it was provided that the bills of lading were to be issued only on the production of the mate's receipts. (c) The appellants took letters of indemnity from the Export Company, to whom they gave the bills of lading. The circumstances in this case

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(1) (1930) 52 Cal. L. J. 365, 373, 402. (2) L. R. 17 Eq. 92.

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distinguish it from *Hathesing v. Laing*. (1) The letter of indemnity is strongly relied on.

Assuming that there is no duty not to issue bills of lading without the production of the mate's receipts, then it is contended that notice of the sellers' claim having been given to the ship on May 27, 1926, when the goods were on the high seas, the sellers were entitled to a special property in the goods and were entitled to immediate possession from the appellants. No higher title would pass to the Bank as against the sellers than the Export Company possessed.

[Reference was made to ss. 77, 78 and 79 of the Indian Contract Act; and on the question of onus to *Bhup Narain Singh v. Gokhul Chand Mahton*. (2) Reference was also made to *Rash Behari Karuri v. Narain Das Dorilal*. (3)] The principle in *Whitehorn Brothers v. Davison* (4) does not apply here; there was no question about there being a valid transfer until avoided; there was no right in the Export Company to transfer at all. *Heap v. Motorists' Advisory Agency, Ltd.* (5) is clearly in point and is relied on.

J. M. Pringle followed, and referred to *Heap v. Motorists' Advisory Agency, Ltd.* (6); *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (7); Halsbury's Laws of England, Vol. 25, p. 182, para. 324, and note (e); *Falk v. Fletcher* (8); *Moakes v. Nicolson* (9); *Dodsley v. Varley* (10); and Benjamin on Sale of Personal Property, 7th ed., p. 230.

Sir Robert Aske K.C. replied. As soon as the goods are placed alongside by the sellers under the contract the property passes, and the sellers have neither property nor possession; they have to rely for protection on such control as the mate's receipts give them. A mate's receipt is not a document of title: *Official Assignee of Madras v. Mercantile Bank of India, Ltd.* (11) If the sellers had taken the mate's receipts

(1) L. R. 17 Eq. 92.

(2) (1933) L. R. 61 I. A. 115, 123.

(3) (1922) I. L. R. 50 C. 399, 408.

(4) [1911] 1 K. B. 463.

(5) [1923] 1 K. B. 577.

(6) Ibid. 589.

(7) [1915] 3 K. B. 676.

(8) (1865) 18 C. B. (N. S.) 403.

(9) (1865) 19 C. B. (N. S.) 290.

(10) (1840) 12 A. & E. 632.

(11) [1935] A. C. 53.

in their own name there would have been no difficulty. Whatever the rights of the sellers may be as against their buyers, as against the appellants, who are merely carriers of the goods, they have no rights whatever in respect of delivery of the goods, except in conversion, and unless the respondents can prove that the ship was guilty of conversion, it is not necessary even to consider what are the relative merits of the claim as between the sellers and the assignees of the bills of lading.

[Reference was made to *Gobind Chunder Sein v. Ryan* (1), and to Scrutton on Charterparties and Bills of Lading, 13 ed., pp. 228 and 192 (note o).]

March 11. The judgment of their Lordships was delivered by LORD WRIGHT. The appellants in this appeal, a Japanese ship-owning company, have been held liable to pay to the respondents, who are brokers and merchants at Calcutta, damages representing the value of certain consignments of jute gunny bags. Before explaining the issues in the case it will be convenient to state in briefest possible outline the material facts and documents.

On May 4, 1926, the respondents entered into three contracts with three mills respectively for the purchase of a total quantity of 250 bales of gunnies. On the same day they sold the same quantity of 250 bales to a company called the International Export Company, Limited, carrying on business in Calcutta, who will be referred to as the Export Company. The conditions of all the contracts were identical, the form used being the ordinary form approved by the Indian Jute Manufacturers Association. This is the form under which the entire export business in gunnies in Calcutta is conducted. Clauses 3 and 4 of the terms and conditions are material:—

“3. Payments to be made in cash in exchange for delivery “order on sellers, or for railway receipts, or for dock’s “receipts or mates’ receipts (which dock’s receipts or mates’ “receipts are to be handed by a dock or ship’s officer to the “seller’s representatives).”

(1) (1861) 9 Moo. I. A. 140, 164.

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"4. The buyers hereby acknowledge that so long as such "railway receipts or mates' receipts (whether in sellers' or "buyers' name) are in possession of the sellers, the lien of "the sellers as unpaid vendors subsists both on such railway "receipts or dock's or mates' receipts and the goods they "represent until payment in full."

The contracts stipulated for delivery free alongside export vessel in the port of Calcutta. The Export Company in due course had engaged freight from the appellants. The terms of the engagement are taken as evidenced by a document, called a shipping order, from the appellants' Calcutta branch to the ship's commanding officer. It was there stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta, and that the receipt of cargo issued by the ship (that is the mate's receipt) must be exchanged for bill of lading. On May 4, 1926, the Export Company gave shipping instructions to the respondents, which they passed on in the same terms to the three mills. On May 17 and 18, 1926, two of the mills sent alongside certain parcels to the *Moji Maru*, and the remaining quantities were sent to the *Hakata Maru*. These two vessels were owned by the appellants, who received the parcels in accordance with the shipping engagement between themselves and the Export Company, and issued mate's receipts as presented to them for signature by the mills; these receipts were in the following terms: "Received on "board . . . for conveyance to Kobe from [the Export "Company] the undermentioned goods subject to the terms "and conditions of the Company's Bill of Lading."

These receipts were severally delivered to the mills' sircars, who had tendered with the goods a request to the steamer in the following terms: "Please receive on board from the "above mills the undernoted goods, shipping documents "for which have been taken out in the name of Messrs. "International Export Co., Ltd., and hand mate's receipt "to our sircar."

In three cases on the same day as the mate's receipts were severally given, and in one case on the following day, the

appellants issued the respective bills of lading describing the goods as shipped by the Export Company and deliverable to order at Kobe, without the mate's receipts being given in exchange, but a letter of guarantee or indemnity was in each case taken from the Export Company by the appellants. At these several dates the respondents were not themselves in possession of the mate's receipts, which they obtained from the mills a few days later against payment. When they thus obtained the mate's receipts they tendered them to the Export Company, who defaulted in payment. Thereupon the respondents, on May 27, 1926, gave notice in writing to the appellants that they had an unsatisfied lien or claim for the price and were entitled to retain the relative mate's receipts, and that bills of lading must not be issued by the appellants until mate's receipts were surrendered to them. By that time, however, the Export Company, having the bills of lading in their possession, had resold the goods to purchasers in Japan, and had drawn bills of exchange for the price on the purchasers. These bills of exchange they had discounted with a bank (sometimes referred to in the proceedings as the Taiwan Bank, but in fact the International Banking Corporation, a subsidiary of the National City Bank of New York), and had endorsed to them by way of security the bills of lading. On June 12, 1926, the respondents, as they could get no satisfaction from the Export Company, and as the appellants replied that they had passed bills of lading on the shipper's (that is, the Export Company's) own letter of guarantee and referred the respondents to the shippers, issued their writ, claiming payment of the price from the Export Company and damages from the appellants. In due course the vessels, the *Moji Maru* having sailed on May 19 and the *Hakata Maru* on June 4, 1926, proceeded to their destination, and the goods were delivered at Kobe on presentation of the bills of lading. An application which had been made by the respondents for an injunction and interim receivership of the goods while the ships were still at sea had been ordered to stand over till the trial.

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At the trial, which took place in July, 1929, the Export Company did not appear, and judgment went against them. But the judge, Buckland J., dismissed the suit as against the appellants. He held that the appellants could not be held liable to the respondents for issuing the bills of lading without having the mate's receipts unless they had received notice of the respondents' lien or claim before they did so. For this purpose the written notice of May 27, 1926, was too late. He rejected the respondents' evidence that oral notice had been given on May 14, 1926. "Admittedly," he held on the evidence, "it was a common practice" at the port of Calcutta to issue bills of lading without mate's receipt. He curtly negatived the contention that the respondents had a special property in the goods which was violated by the delivery at Kobe to the bill of lading holders, so that the respondents were entitled to damages as in trespass or conversion.

The respondents having appealed, judgment was given by the Court of Appeal on July 22, 1930. Rankin C.J., who delivered the leading judgment, agreed with the trial judge that the appellants were guilty of no breach of duty in issuing the bills of lading to the Export Company, which was named as shipper in the mate's receipts. He gave his reasons for this conclusion shortly, as he had already more fully discussed the point in giving judgment in an appeal heard by the Court immediately before, *Nippon Yusen Kaisha v. Mahaliram Ramjidas*. (1) But he held that the respondents had a special property or right of possession in the goods, and that the notice of lien and other demands were sufficient to render the appellants guilty of conversion for that, notwithstanding the notice and demands, they delivered the goods under the bills of lading, because, he said, "an indorsee of a bill of lading cannot make a better title to the goods than his indorser upon the principle of purchaser for value without notice." But, as he was of opinion that s. 178 of the Indian Contract Act might entitle the Bank to claim as against the respondents a better title than the Export

(1) (1930) 52 Cal. L. J. 365.

Company to the goods, he ordered a remand to determine that issue. Ghose J. concurred with the Chief Justice, while Lort Williams J. dissented.

Buckland J., who tried the issue, held that the transaction was of the most ordinary and normal kind in every way, and that there was no question on the evidence before him of any want of good faith or of any circumstance that would raise any presumption whatever that the Bank was acting improperly. This finding came before the Court of Appeal, which reversed the finding of the judge, and held that judgment should be entered for the respondents against the appellants for a sum to be agreed or ascertained. Derbyshire C.J., with whom the other members of the Court agreed, held that the onus was on a party seeking to rely on s. 178, to establish affirmatively that he acted in good faith and under circumstances which were not such as to raise a reasonable presumption that he acted improperly, and that the appellants had failed to discharge that onus.

The present appeal is from the judgment so entered against the appellants.

The matters to be decided in the appeal are, first, whether the appellants, in issuing bills of lading without having the mate's receipts, committed a wrong as against the respondents, and secondly, whether by delivering to the bill of lading holders they converted the respondents' goods, that is, goods in which the respondents had an immediate right of possession as against the indorsees of the bill of lading, which was infringed by the delivery from the ships at Kobe. If both these questions are answered in the negative, the third question, which has been dealt with by the Court of Appeal and debated before this Board, does not arise.

The first issue to be determined is when under the contract the property passed. The sale was of unascertained goods. Prima facie on such a sale the property in the goods passes when goods answering to the contract description are unconditionally appropriated to the contract with the assent of the buyer, which, in this connection, does not mean expressed assent, but simply that the appropriation has been

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made in the manner contemplated by the parties. This prima facie rule may, however, be varied by the terms of the contract, or even by a reservation made by the seller in the act of appropriation. The general rule is that the property passes when the parties intend it to pass. In the present case, the sale being free alongside, the property prima facie passes when the goods are appropriated by delivery alongside in implement of the contracts. It is, however, said that cl. 3 of the contract precludes the passing of the property until the price is paid against the mate's receipts or the other documents specified. That would no doubt be so if cl. 3 were not followed by cl. 4. The contract must, however, be read as a whole. Clause 4 provides for a lien of the sellers as unpaid vendors on the mate's receipts or other documents so long as they remain in the sellers' possession, and on the goods, until payment in full. Can this be reconciled with the reservation of the jus disponendi which cl. 3 would import if it stood alone? That depends on the meaning to be attributed to the word "lien" as used in regard to the goods. A common law lien is possessory and depends on possession, but it also presupposes that the property in the goods has passed. A person cannot have a lien on his own goods. Thus cl. 4 imports that notwithstanding cl. 3 the property has passed when the goods were delivered alongside, that is, placed in possession of the shipowners. The result is that the sellers have parted with both property and possession. "Lien" must therefore be used in a different sense, as meaning either an equitable lien or a hypothecation such as that discussed by this Board in *Official Assignee of Madras v. Mercantile Bank of India, Ltd.* (1), or the common law right or licence to resume possession, such as that discussed in *Howes v. Ball*. (2) The result is that the sellers had, after delivery alongside, nothing left except the equitable charge, which is only enforceable by equitable remedies, against the buyers or person taking with notice of the equity, or a licence to resume possession which is personal or contractual as

(1) [1935] A. C. 53; L. R. 61 I. A. 416. (2) (1827) 7 B. & C. 481.

between the sellers and buyers. In neither case was there left to the sellers a common law or possessory lien, which, if it existed, would have been a right in the nature of property and would have supported an action in conversion or trespass. The importance of this conclusion in the present case will appear later.

A different state of things would have resulted if the sellers had delivered the goods to the ship in their own name as shippers, so that the ship would have held the goods on their behalf. But they did not. They delivered the goods as being shipped by the Export Company, and took a mate's receipt which expressly stated the name of the Export Company as shippers. In this way the ship received the goods on behalf of the Export Company, who had booked the freight from the shipowners. All that the sellers had was possession of, or a lien on, the mate's receipt. It is, however, on this fact, coupled with the terms of the challan or document delivered to the ship by the mills with the goods, and also on the course of business, that the respondents rely as justifying their first claim, which is that the issue of the bills of lading to the Export Company, without production of the mate's receipt, was a wrongful act by the appellants as against them, which deprived them of their security on the goods and caused them damage equivalent to the full value.

The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however, prima facie evidence of the quantity and condition of the goods received, and prima facie it is the recipient or possessor who is entitled to have the bill of lading issued to him. But if the mate's receipt acknowledges receipt from a shipper other than the person who actually receives the mate's receipt, and, in particular, if the property is in that shipper, and the shipper has contracted for the freight, the shipowner

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will prima facie be entitled, and indeed bound, to deliver the bill of lading to that person. So it was held by Bacon V-C. in *Hathesing v. Laing* (1), a case in principle not different on its facts from the present. It was held that the indorsement of the mate's receipt did not transfer a property which overrode that given by the indorsement of the bill of lading, which had been issued without production of the mate's receipt, though the latter was held as security by the person to whom it had been issued. In that case, as in this, the person who delivered the goods to the ship took the mate's receipt describing the debtors as the shippers. No doubt, if the shipowner, before he issues the bill of lading, is given express notice that he is not to issue the bill of lading without the mate's receipt or to anyone but the person who delivered the goods, he cannot disregard that notice. Even without express notice, he may be affected by notice to the same effect by knowledge of the actual circumstances of the case. *Hathesing v. Laing* (1) was decided in 1873, and has been treated as good law ever since, as, for instance, in the late Judge Carver's "Carriage of Goods by Sea," s. 60. Indeed, it is difficult to see what other course a shipowner in a case like this could, in the absence of notice, adopt. He is bound to deliver bills of lading for the goods to the shipper; the shipper here is beyond question the Export Co., who engaged the freight, who are owners of the goods, who are described in the document presented by the mills as the persons in whose name shipping documents have been taken out, and whose name appeared in the mate's receipts as the persons from whom the goods were received. The mills, who at the respective dates of the mate's receipts had not been paid by the respondents, might have given notice of lien on their own or the respondents' behalf, or they might have inserted the names of themselves or the respondents as persons shipping the goods and persons to whom the mate's receipts were to be given. If that were done, the appellants could not properly have issued bills of lading to the Export Company. But if the mills or the respondents had taken the bills of

lading in their own name as shippers, they would have become liable on the bill of lading contract, and in particular for payment of advance freight. It was not till May 27, 1926, that express notice was given to the appellants not to issue bills of lading, but it was then too late to close the stable door. An attempt to prove express notice given on May 14, 1926, which would have been in time, completely failed. Various matters were relied upon as amounting to implied or indirect notice. It was said that the direction in the mills' sircars amounted to sufficient notice, especially when coupled with the course of business in the trade, according to which payment is to be made against the mate's receipts, which thus constitute a sort of security. But as the receipt itself acknowledges shipment by the Export Company, the mere direction to give the receipt to the mills' sircar appears to be too obscure and ambiguous to countervail the clear recognition of property in the Export Company. There might be many reasons why the receipt should be given to the person who actually delivered the goods to the ship. It is admitted by witnesses on both sides that bills of lading were frequently issued without mate's receipts against an indemnity. Such an indemnity is a common commercial precaution in use all over the World whenever bills of lading are issued without mate's receipts, and no sinister inference can be drawn from its being taken. It is true that the Export Company had obtained bills of lading in several cases from the appellants against an indemnity without producing mate's receipts, and that the appellants had been complaining, and demanding delivery of the mate's receipts, but vendors must have been in some measure aware of what was being done; it is suggested that they did not wish to make trouble with the shippers, the Export Company, who seem to have been doing a large business until the crash came about the end of May, 1926. There is no finding of any fraudulent collusion between the Export Company and the appellants, or indeed any evidence of that nature.

Under all the circumstances of the case, not only was

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there no timeous express notice to the appellants, but there is no ground for imputing implied notice. The case must be regarded as one in which shipowners, who for their own protection stipulated with the shippers that bills of lading were to be given in exchange for mate's receipts, waived that provision, and without notice issued bills of lading to the named shippers and owners of the cargo. It would impose an unprecedented burden on shipowners if under such circumstances they were held responsible. Their Lordships agree with the conclusion of Sir George Rankin C.J. on this issue.

The second issue is alternative. It proceeds on the footing that bills of lading were delivered to the Export Company, but none the less, it is contended, the bills of lading in the Export Company's hands did not dispossess the respondents of their unpaid vendor's lien, or the lien for which they stipulated, because they continued to hold the mate's receipts, and thus they had a right to immediate possession as against the appellants, so that they were entitled to sue in conversion when their notice of May 27, 1926, and their subsequent demands for the goods, were refused by the appellants. The primary question thus is whether the respondents still possessed a right to possession, sufficient to found a claim in conversion. The appellants in reply not merely contest the contention that by the possession of the mate's receipts the respondents retained their lien, but say that the bills of lading had been indorsed to the Bank so as to put an end to the right (if any) of stoppage in transitu, and that they were bound to deliver the goods to the indorsees of the bills of lading, which they duly did.

The learned Chief Justice on this point was in favour of the respondents, though, as already stated, he ordered a remand on the issue based on s. 178 of the Indian Contract Act, 1872, which was then in force, though since repealed in 1930. Their Lordships, with all deference, find themselves unable to concur in this conclusion in the respondents' favour. It seems to be based on two propositions, first that under the contractual terms, coupled with the retention

of the mate's receipts, the respondents retained a lien or immediate right to possession, which was a property interest and not merely an equitable or personal right or license, and secondly, that as the indorsement of a bill of lading passed no better title than the indorser had, the indorsement and transfer to the Bank passed no greater rights than the Export Company had, so that the Bank could not claim delivery from the shipowners in defeasance of the respondents' possessory title. It is clear, however, that the conclusion of Sir George Rankin C.J. depended on his view that the respondents had a right in law to immediate possession; indeed, it was properly conceded before their Lordships that only such a right would entitle the respondents to claim in conversion, and that a merely equitable right or contractual right or license would not do. Their Lordships agree with Sir George Rankin in his view that the general property passed to the Export Company, but differ from him, for reasons stated earlier in this judgment, in his view that a right at law to possession remained in the respondents. Thus the whole basis of his conclusion fails. It is true generally that a bill of lading is not a negotiable instrument in the sense that a bill of exchange is, and that the transferee of a bill of lading does not get a better title than his transferor. But while that is true of title in law, it cannot be asserted in regard to equitable rights. The legal right given by a possessory lien can, indeed, be distinguished from the general legal property in a thing. This is illustrated by *Pease v. Gloahec*. (1) That case, however also illustrates the distinction between legal and equitable rights. The documents of title in that case had been obtained by fraud from the lawful possessor, who had not the general property which belonged to those guilty of the fraud. It was held that an indorsee from those latter persons in good faith for value got a good title, and not a merely defeasible title, and in that sense got a better title than his transferors, whose possession was defeasible. This is the general rule where the transferor has a title defeasible for fraud, but

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(1) (1866) L. R. 1 P. C. 219.

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the transferee takes in good faith and for value. Another illustration of an equitable right which is defeated by the transfer of a bill of lading to a bona fide indorsee for value is the right of stoppage in transitu. It follows from the same general rule that the equitable lien or personal license which, in their Lordships' judgment, was all that remained with the respondents when the goods were delivered to the ship, did not affect the transferee of the bill of lading so as to found a claim for conversion, though it might indeed found a claim for breach of contract against the Export Company, or a claim for equitable relief against them or any assignees subject to the same equities, a category which would not include the appellants.

In respect of the matters discussed above there is no difference in substance between English and Indian law.

This conclusion renders it unnecessary for this Board to give a decision on the issue raised on the remand under s. 178. It seems, however, proper for their Lordships to say that, as at present advised, they would prefer the judgment of Buckland J. to that of the Court of Appeal. Even assuming that the onus of proof under the section is on the appellants, it would seem that they discharged it by the evidence of the Bank, which showed that the transaction was a banking transaction of the most ordinary and normal character. If it were necessary to look further, the presumption of good faith would complete the proof. But their Lordships are far from satisfied that under the section the onus would have lain with the defendants. There are in the section two separate provisoes. The onus of proof under the second proviso cannot, it seems, be on persons in the position of the defendants, and if so, it would seem to follow that the onus as to the first proviso must likewise rest in the same quarter. Otherwise an anomalous result would follow. Decisions under other statutes have been cited. But it is always dangerous to seek to construe one statute by reference to the words of another. It may well be that in this section the plaintiff who seeks to impugn what is *ex facie* a valid disposition should be held to assume the burden of

showing bad faith and such other matters as the provisoes require to be established in the particular case.

Their Lordships, on the whole case, are of opinion that the appeal should be allowed, the orders of the Court of Appeal should be set aside, and the orders of Buckland J. restored, and that the respondents should pay the appellants' costs in the Court of Appeal and before this Board.

They will humbly so advise His Majesty.

Solicitors for appellants : *Waltons & Co.*

Solicitors for respondents : *Barrow, Rogers & Nevill.*

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ON APPEAL FROM THE COURT OF APPEAL OF
NEW ZEALAND.

New Zealand—Currency—Contract executed in England—Employee to serve in New Zealand—Salary of “ seven hundred pounds sterling ” a year—Depreciated New Zealand currency—Payment in English currency or equivalent in New Zealand currency.

By an agreement, made in England in 1932, between the respondents, a company incorporated in New Zealand, and the appellant, then resident in England, the appellant agreed to proceed to New Zealand to be there employed by the respondents as a tailor cutter for a period of three years at a salary of “ seven hundred pounds sterling ” a year. At the date of the agreement the value of the New Zealand pound was at about ten per cent. discount as compared with the English pound, and later during the appellant’s period of service the discrepancy rose to 24 or 25 per cent. The appellant having claimed to be entitled to be paid the agreed salary in such amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange current at the time of each payment, the respondents refused to pay the 700*l.* a year otherwise than in New Zealand currency :—

Held, that “ sterling ” meant British sterling. “ Sterling ” was added in the agreement to define what means of discharge—what currency—was being stipulated, and was an express term excluding the *prima facie* rule according to which New Zealand pounds would be meant, as being the currency of the place of payment. Having regard to the place where, and the parties between whom, the agreement was made, the appellant was entitled under it to be paid his salary of 700*l.* a year in English currency or its equivalent in New Zealand currency at the relevant rates of exchange.

If “ sterling ” had not been inserted, the salary would have been payable in New Zealand currency, being that of the place of payment, in accordance with the principles laid down in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* [1934] A. C. 122.

Judgment of the Court of Appeal of New Zealand [1936] N. Z. L. R. 511 reversed.

* *Present* : LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SIDNEY ROWLATT, and SIR GEORGE RANKIN.

APPEAL (No. 30 of 1937) from a judgment of the Court of Appeal of New Zealand (June 10, 1936) reversing a judgment of the Supreme Court of New Zealand (November 13, 1935).

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By the terms of an agreement made in London on August 2, 1932, the appellant, Charles Francis Martin de Bueger, then resident in London, was to proceed to New Zealand to be there employed by the respondents, J. Ballantyne & Co., Ltd., a company incorporated in New Zealand and there carrying on business as drapers and clothiers, as a tailor cutter for a period of three years from the date of his arrival at a remuneration of "seven hundred pounds sterling" a year. At the beginning of the appellant's service the New Zealand pound was at about ten per cent. discount as compared with the English pound, and later during the period of service the discrepancy rose to 24 or 25 per cent. The appellant consistently claimed to be paid by the respondents the agreed salary of seven hundred pounds sterling a year "in such sums of New Zealand currency as should be the equivalent at the time of each payment of the same amount in English currency." The respondents, however, paid the salary of 700*l.* a year in New Zealand currency, and on August 22, 1935, the appellant brought an action in the Supreme Court of New Zealand against the respondents claiming to recover 397*l.* 9*s.* 2*d.* as representing the difference between the total amount of sums paid monthly to him by the respondents at the rate of 700*l.* a year in New Zealand currency and the total amount of the same number of payments at the rate of 700*l.* a year if paid in English currency. He also claimed interest in respect of each monthly payment on the difference between the pounds of New Zealand currency and the pounds of English currency.

The questions for the opinion of the Court, stated in a special case, and the views of the Supreme Court and of the Court of Appeal of New Zealand appear from the judgment of the Judicial Committee.

The Supreme Court of New Zealand (Northcroft J.) decided in favour of the appellant, holding that the word "sterling"

J. C. in the agreement must be construed as signifying English
 1938 currency.
 DE BUEGER The Court of Appeal of New Zealand (Ostler, Blair and
 v. Kennedy J.J., Reed A.C.J. dissenting) were of opinion that
 J. under the agreement payment was to be at the rate of 700*l.*
 BALLANTYNE & Co. a year in New Zealand currency. The appeal is reported
 at [1936] N. Z. L. R. 511.

1938. Jan. 31. *J. D. Casswell* and *J. A. Lloyd* for the appellant. The point, a very short one, is as to the proper construction in the agreement of August 2, 1932, of the words "pounds sterling." There does not appear to be any authority in which "pounds sterling" refers to currency other than English. *Auckland Corporation v. Alliance Assurance Co.* (1) is very different from the present case; in that case the word "sterling" is not mentioned at all. The general rule of presumptive law is that monetary obligations are effectively discharged by payment in the currency which is legal tender in the locus solutionis, but that rule applies only where there is no express provision to the contrary, or any inference to the contrary is to be drawn from the surrounding circumstances. It was said in *Jacobs, Marcus & Co. v. Crédit Lyonnais* (2) that (3): "The broad rule is that the law of "a country where a contract is made presumably governs "the nature, the obligation and the interpretation of it, "unless the contrary appears to be the express intention of the "parties. . . . In most cases no doubt where a contract "has to be wholly performed abroad, the reasonable "presumption may be that it is intended to be a foreign "contract determined by foreign law; but this *prima facie* "view is in its turn capable of being rebutted by the ex- "pressed or implied intention of the parties as deduced "from other circumstances." It is submitted that that view covers the present case, and it was affirmed in the *Auckland* case (4), where the words "in the absence of any "express provision" were used. [Reference was made to

(1) [1937] A. C. 587, 596-7, 599, 603.

(2) (1884) 12 Q. B. D. 589.

(3) (1884) 12 Q. B. D. 600-1.

(4) [1937] A. C. 587.

Saunders v. Drake (1), and *Scott v. Bevan*. (2)] In all the following cases the word "sterling" is continually used as meaning British sterling, and contrasted with Colonial currency: *King Line, Ltd. v. Westralian Farmers, Ltd.* (3); *Broken Hill Proprietary Co. v. Latham* (4); *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (5); and *Feist v. Société Intercommunale Belge D'Électricité*. (6) When the parties met in London to decide what remuneration the appellant was to receive, the word "sterling" was put into the agreement with the definite object of ensuring that he should receive English currency or the New Zealand equivalent of it.

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Alexander Ross for the respondents. This case is different from all the other cases in that it is not a case of a debt being contracted in England and payable elsewhere, or contracted in New Zealand and payable elsewhere. It is the case of a man who has gone out to New Zealand and taken all his goods and personal belongings with him; his whole contract is to be performed in New Zealand, and one factor is that he would be anxious to discover what the words in the contract he was signing meant in the country to which he was going. Further, cl. 4 of the agreement provides that the appellant's employment should be subject to the usual provisions of employment of that nature adopted by the respondents in New Zealand; it is therefore clear that the respondents' intention was that he should be on the same footing as their other employees. In New Zealand the word "sterling" was commonly known and used, and appeared in a carefully drawn contract in *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*. (7) The position in New Zealand when the agreement in question was signed, 1932, was the same as it was at the time of the *Auckland* case (8) and the *Mount Albert* case. (7) For two months the appellant was in fact paid in New Zealand bank-notes on which the word

(1) (1742) 2 Atk. 464, 465.

(2) (1831) 2 B. & Ad. 78.

(3) (1932) 48 Times L. R. 598.

(4) [1933] 1 Ch. 373.

(5) [1934] A. C. 122.

(6) [1934] A. C. 161.

(7) Ante p. 224.

(8) [1937] A. C. 587.

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"sterling" appeared. It is not disputed that "sterling" by itself would mean English currency, but it is submitted that the words "pounds sterling" have two different meanings: (a) as expressing a unit of account, when it refers to the English pounds as the units of account, i.e., the same units of account as exist both in England and in Australia and New Zealand, and distinguishes that English pound from pounds of other countries: and (b) the "pound sterling" when it is measuring the obligation as distinct from expressing currency, and the obligation expressed in "pounds sterling" was dischargeable by payment of legal tender in the country where the obligation was to be discharged—namely, in New Zealand currency. The words "pounds sterling" are just as commonly used in New Zealand as they are in England. [Reference was made to *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (1); and to the *Case de Mixt Moneys* (2), where the obligation was to pay "rool. sterling."]

J. D. Casswell replied.

Feb. 14. The judgment of their Lordships was delivered by LORD WRIGHT. This appeal raises a short but interesting question of the construction of an agreement about which the decisions in the Courts of New Zealand have exhibited differences of opinion. The agreement was made in London on August 2, 1932, between the respondents, described as "a company incorporated in New Zealand, "whose London Office is at 117 Wool Exchange, Basinghall Street, in the City of London," and the appellant, described as "Charles Francis Martin de Bueger, of 139 Albany Street, "Regents Park, in the County of London." Under the agreement the appellant was to proceed to New Zealand, there to be employed by the respondents as a tailor cutter for a period of three years from his arrival at a remuneration of seven hundred pounds sterling a year. The sole question is whether the appellant is entitled under that agreement to be paid according to the English or the New Zealand value

(1) [1934] A. C. 122.

(2) (1604) Davis (Ireland) 18.

of the pound. At the date of the agreement the latter was at about ten per cent. discount as compared with the former, later during the period of the service the discrepancy rose to 24 or 25 per cent. A special case was submitted to the Court. It states that the appellant had always consistently claimed to be paid the agreed salary "in such sums of New Zealand currency as should be the equivalent at the time of "each payment of the same amount in sterling," and that the respondents had refused to pay the 700*l.* otherwise than in New Zealand currency. The case stated three questions for the opinion of the Court, of which the answer to the first is decisive of the dispute. It is (1.) "Was the plaintiff "[appellant] entitled to be paid the agreed salary in such "amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange current "at the time of each payment?" No point is raised on the phrasing of this question, which might seem to suggest the answer. Question 2 is whether, if the appellant is right in his claim, the deficiency on each periodical payment carries interest? This is not now disputed. Question 3 is whether the payments actually made in New Zealand currency of 700*l.* were a full discharge of the agreed salary? The answer to that question obviously must follow the answer which is given to the first question.

Northcroft J., in the Supreme Court (1), decided in favour of the appellant. He held, in effect, that the question was purely one of construction of this particular contract. The use of the word "sterling" could not, in his opinion, be regarded as a mere habit of speech not meaning anything more than legal tender. In this contract he thought the word must be construed as signifying English currency in contrast with currency of other countries, and in particular with that of Australia or New Zealand. He referred to recent cases in which this contrast between sterling and other currency was plainly recognized.

In the Court of Appeal that decision was reversed by a majority. Reed A.C.J., who dissented, held that in the

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absence of the word "sterling" the salary would have been payable in New Zealand currency, because it was the currency of the place of performance. But the use of the word "sterling," which was not common form in a contract of service, in a commercial contract drawn and executed in London, must, in his opinion, be taken to express "the intentions of the parties as to the currency in which the remuneration should be paid." (1) He held that "sterling" here meant British currency, and was in constant use in that sense.

Ostler J., as also Kennedy J., with whose judgment Blair J. agreed, took the opposite view. Ostler J. held that as in August, 1932, the New Zealand pound was only at a discount of ten per cent., and was not depreciated to 25 per cent. until January, 1933, the appellant was not likely to have exchange questions in his mind, and if he had, should have insisted on less ambiguous language than the word "sterling," which, he said, was used both in England and New Zealand as meaning the currency which has now taken the place of gold as legal tender. He would have come to a different conclusion if the New Zealand pound had been a different unit of account when the contract was made, but held that it followed from *Adelaide Electric Supply Co. v. Prudential Assurance Co.* (2) that the English and New Zealand pound were the same, and hence that payment in New Zealand currency was a sufficient performance, since in New Zealand the word "sterling," at least until the Reserve Bank of New Zealand Act, 1933, meant nothing more than paper money which had taken the place since August, 1914, of the sovereign as legal tender. Kennedy J. also emphasizes as the ground of his decision that "the English "pound or the pound sterling, as the unit of account, is "not only identical with the English pound used in England "for so many years, but it is also one and the same as the "New Zealand pound." (3) "The pound in New Zealand "is," he held, "the same unit of account as the pound in

(1) [1936] N. Z. L. R. 523.

(3) [1936] N. Z. L. R. 528.

(2) [1934] A. C. 122.

"England, not merely a unit of account with the same "name"; hence he concludes "the obligation to be discharged by payment in New Zealand is expressed in a "money of account common to New Zealand and to England, "and will be discharged by tender of that which is legal "tender at the place of performance." (1) Thus, in his judgment, the word "sterling" adds nothing. It merely, he adds, "emphasizes, what is already clear, that the money "of account is English." (1) He seems to use interchangeably unit of account and money of account, though the former should refer to a denomination and the latter to a currency.

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Their Lordships, with the greatest respect, find themselves unable to agree with the majority of the Court of Appeal. It is important to realize what the *Adelaide* case (2) actually decided. The decision was that a sum in "pounds" payable under a contract made in England, but payable in Australia, was payable not in sterling but in Australian currency. The difference in money value was very substantial, so that to a practical mind it would seem wrong to say that the English pound and the Australian pound were the same. They were only identical in name and as a matter of words, though up to 1914 they had been the same both in name and in fact, both being linked to gold, and based on the same gold coin, the sovereign. This identity in words, combined with practical difference in value, was expressed by Lord Warrington of Clyffe in the *Adelaide* case, where he said (3): "I have come "to the conclusion that, merely as a unit of account, the pound "symbolized by the £ is one and the same in both countries, "and that the difference in the currencies merely concerns "the means whereby an obligation to pay so many of such "units is to be discharged."

It was just this difference in the "means" of discharging the obligation, that is, the actual currency, which was the essence of the case.

This practical difference was again emphasized in *Payne*

(1) [1936] N. Z. L. R. 529.

(3) [1934] A. C. 138.

(2) [1934] A. C. 122.

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DE BUEGER v. *Deputy Federal Commissioner of Taxation* (1), where an Australian taxpayer was objecting to convert income received in English sterling and left in England into Australian currency when making his tax returns. The figure of income, if so converted, was substantially higher than it would have been if he could have brought in his sterling income at its face amount. It was held that he was bound to convert the English pounds into Australian pounds. The name of the measure of the obligation might be identical, but the measure of the value connoted, or of the means of discharging it, was different.

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It is clear that under a contract like that in question what matters to the parties is the means (that is, the currency) in which the obligation is to be discharged. In their Lordships' judgment, the word "sterling" was added in the agreement in order to define what means of discharge, that is, what currency, was being stipulated. The necessity for adding the word was simply because the "unit of account," the word "pound" or symbol £, is the same both in England and in New Zealand. If the word "sterling" had not been inserted, the salary would have been payable in New Zealand currency, that being the place of payment, on the principles laid down in the *Adelaide* case. (2) The effect of that decision was recently summarized by this Board in *Auckland Corporation v. Alliance Assurance Co.* (3): "It is quite clear that 'the whole problem [in that case] arose because of the 'divergence in value of the two currencies, and it was solved, 'as a question of construction, by determining what currency, 'in the true construction of the contract, was connoted by 'the use of the word 'pound.' It was held that in the 'absence of express terms to the contrary, or of matters 'in the contract raising an inference to the contrary, the 'currency of the country in which it was stipulated that 'payment was to be made was the currency meant. Contracts are expressed in terms of the unit of account, but 'the unit of account is only a denomination connoting the 'appropriate currency.'"

(1) [1936] A. C. 497.

(2) [1934] A. C. 122.

(3) [1937] A. C. 587, 604.

In the agreement here in question, the word "sterling," in their Lordships' judgment, is an express term intended to exclude, and in fact excluding, the *prima facie* rule according to which New Zealand pounds would be meant, as being the currency of the place of payment. It is impossible, in their judgment, to regard the word as indicating simply legal tender at the place of payment, New Zealand. The agreement is clearly on its face a formal and studied document. It is drawn up and executed in London between the respondents' London house and the appellant, a London resident. The insertion of the word "sterling" is not common form in a service agreement like this. If it is used in any business document in London, it naturally means "British sterling," and nothing else. It is used in this sense habitually in exchange quotations, and in documents dealing with international transactions, in which it is necessary to define the currency intended, including transactions with the Dominions. The contrast between sterling (*sc.*, British sterling or currency) and Dominion or Colonial currency is familiar. The contrasted use of these terms is to be found in seventeenth and eighteenth century authorities, of which some are cited in the *Adelaide* case. (1) The contrast between sterling and other currency is also illustrated in *King Line, Ltd. v. Western Australian Farmers, Ltd.* (2), where the charterparty distinguished between British sterling and Australian currency, and also *passim* in recent judgments in this country such as the *Adelaide* case (3) and the *Auckland* case. (4) Having regard to the place where, and the parties between whom, this contract was made, their Lordships are satisfied that the appellant's claim is well founded. It is not to be forgotten that in August, 1932, exchange questions were matters of business moment. The appellant, who was going to New Zealand, might naturally desire to be assured that he would be paid in the currency with which he was familiar.

Their Lordships do not desire to express any opinion on the question whether the construction of the agreement

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(1) [1934] A. C. 153.

(2) (1932) 48 Times L. R. 598.

(3) [1934] A. C. 122.

(4) [1937] A. C. 587.

J. C. would have been the same if it had been made and entered
1938 into in New Zealand. On this question eminent judges in
DE BUEGER New Zealand seem to differ, and their Lordships need not
v. decide it on this occasion. But it would not, in their Lord-
BALLANTYNE ships' judgment, be right to attribute to the appellant, or
& Co. indeed to the respondents' London house, or to those who
drafted the agreement, any familiarity with the law and
practice of New Zealand in matters of currency, or any in-
tention to import that law or practice, whatever it might be,
into the agreement, which was obviously drafted with the
idea of eliminating any doubt or dispute that the appellant
would be paid the same amount of salary as if he were working
in England.

For these reasons, their Lordships are of opinion that the
appeal should be allowed, and the judgment of Northcroft J.
restored. If the parties are unable to agree on the sum to
which the appellant is entitled, there must be an order for a
reference to the Supreme Court to fix it. The appellant will
have his costs of this appeal and his costs in the Courts below.

Their Lordships will humbly so advise His Majesty.

Solicitors for appellant : *Lloyd & Lloyd.*

Solicitors for respondents : *Wray, Smith & Halford.*

[PRIVY COUNCIL.]

BOSCH AND ANOTHER. APPELLANTS ;
 AND
 PERPETUAL TRUSTEE COMPANY, }
 LIMITED, AND OTHERS } RESPONDENTS.

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Feb. 22.

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

Australia — New South Wales — Family maintenance — Testamentary provision for testator's children—Whether adequate for proper maintenance, education or advancement in life—Application for increase—Discretion—Consideration of all circumstances—Principles applicable—Testator's Family Maintenance and Guardianship of Infants Act, N. S. W., No. 41 of 1916, s. 3, sub-s. 1.

The Court, in determining in the exercise of its discretion under s. 3, sub-s. 1, of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, of New South Wales, what constitutes adequate provision for the "proper maintenance, "education or advancement in life" of a testator's widow or children, or any of them, where by his will he has failed to make such adequate provision, must have regard to all the existing facts and surrounding circumstances. "Proper" maintenance connotes something different from the word "adequate." The Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating him for that purpose as a wise and just, rather than a fond and foolish, husband or father. The amount to be provided, if any, is not to be measured solely by the need of maintenance ; but the Court, having to consider what is "proper" maintenance, must take into consideration the extent of the property left by the testator, and where the estate is a large one the Court is justified in making provision to meet contingencies which may have to be disregarded where the estate is small. In the case of children, age is a material consideration.

The sub-section contains no other limitation than is involved by the use of the words "proper" and "all the circumstances "of the case," and the introduction into it of any limitation by reference to a particular sum of money, or any limitation by reference to the kind of education for which provision should be made, is to be strongly deprecated.

Where on the evidence it appears that the testator's omission to perform the duty of making proper provision for his wife and

* *Present* : LORD WRIGHT, LORD ROMER, SIR SIDNEY ROWLATT, and SIR GEORGE RANKIN.

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children was due to mistake or oversight, his wishes may legitimately be taken into consideration by the Court. Also, the opinions and wishes of the mother of the testator's children, where they are seeking increased provision, if she appears to be just and wise, are not to be excluded from the circumstances to which under the Act the Court must pay attention. It is not a valid reason for refusing to increase such children's legacies that, on the mother's application, the Court had made an increase in the provision made for her by the testator; regard should be had to the fact that existing circumstances would not necessarily remain unchanged in the future.

Dicta in *In re Allardice*, *Allardice v. Allardice* (1910) 29 N. Z. L. R. 959, at pp. 970 and 972, and in *In re Allen (Deceased)*, *Allen v. Manchester* [1922] N. Z. L. R. 218, at p. 220, approved.

Judgment of the Supreme Court of New South Wales reversed in part.

APPEAL (No. 59 of 1937) from so much of an order of the Supreme Court of New South Wales (in Equity) (December 11, 1936) as refused to make increased provision for the proper maintenance, education or advancement in life of the appellants, Henry Bosch and Edward Graham Bosch, aged seven and four years respectively, out of the estate of their father, George Bosch, who died on August 30, 1934.

The application for the increase was made on October 23, 1936, under s. 3, sub-s. 1, of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, of New South Wales, which provides that: "If any person (hereinafter called 'the testator') dying or having died since the 7th of October, 1915, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the Court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them."

By his will, dated December 29, 1932, the testator, who

died leaving about 257,000*l.*, left the appellants 15,000*l.* each at twenty-five, with certain forfeiture conditions, and the application out of which this appeal arose was that that sum should be increased to 25,000*l.* each. The testator's widow—the mother of the appellants—who was a co-trustee and co-executor of the will with the Perpetual Trustee Company, Ltd., now appeared as a respondent, and while in no way objecting to the further provision being made for her children, contended that it should be made in such manner as not to reduce or affect the provision which the Court below had made for her on her application under the Act of 1916 for an increase—namely, 33,800*l.* in cash, and an annuity of 2000*l.* a year, not reducible on marriage, in place of the provision made for her by the will and a codicil thereto—namely, legacies to the value of 10,000*l.*, and a life annuity of 1000*l.* a year, reducible to 500*l.* a year on remarriage.

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The respondents, the Perpetual Trustee Company, Ltd., did not appear on the appeal. The respondents, the University of Sydney, which the testator had benefited in his lifetime to the extent of about 220,000*l.*, were his residuary legatees.

The facts appear more fully from the judgment of the Judicial Committee.

The Supreme Court of New South Wales (in Equity) (Nicholas J.) declined to make any order increasing either of the two legacies, although he deleted the forfeiture clauses. On December 11, 1936, the application was restored, and supported by further evidence, but Nicholas J., whose reasons for so deciding are stated in the judgment of the Judicial Committee, declined to add anything to the order he had made on October 23, 1936.

1938. Feb. 1, 3. *H. B. Vaisey K.C.* and *W. T. Elverston* for the appellants. The question in this appeal arises under s. 3, sub-s. 1, of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, of New South Wales [the sub-section was read]. There has been similar legislation in all the Australian States and in New Zealand, and there is pending before the Legislature in this country a Bill which is

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intended to introduce into English law a similar legislative provision. New Zealand passed the legislation in 1900, followed by Victoria in 1906, New South Wales in 1908, Tasmania in 1912, Queensland in 1914, South Australia in 1918, and Western Australia in 1920. The wording of those Acts is slightly different in every case, but the New South Wales Act would appear to contain the strongest words in favour of the exercise of the jurisdiction. It contains the very important words "taking into consideration all the "circumstances of the case," which are not found in the other Acts. Also, in the New South Wales Act there is not only a reference to proper maintenance, and education, but also to "advancement in life." There have been a great number of reported decisions in New Zealand, not many from the Australian States, and only one before this Board, *Allardice v. Allardice*. (1) The principles applicable in all the States appear to be identical: The Testator's Family Maintenance, by Mason, Tuthill and Lennard, 1929, p. 61, and Stephen's Testator's Family Maintenance, 1934, treat the reported cases as interchangeable.

There are two classes of cases which arise for consideration under the Act of 1916: (a) where the estate is not enough to provide for all the moral claims in full; and (b) where the estate is ample, and the problem is how much of the testator's estate is to be treated as properly to be given away to strangers, especially charities, and how much he ought in the circumstances to have provided for those who are his natural dependants. The present is one of the second class of cases. It is now asked that the 15,000*l.* should be increased to 25,000*l.* each, which would be giving to the only children of the testator about one-fifth of his estate. It is, of course, a question of discretion for the judge who hears the application, and this Board would not disturb the discretion properly exercised upon sufficient grounds; but the reasons which Nicholas J. gave in this case showed, it is submitted, that he did not properly exercise his discretion, and proceeded on a wrong basis, for the following reasons: (a) He did not take

(1) [1911] A. C. 730.

into consideration that the testator, when he died, had in contemplation an alteration of his will which would have given larger benefits to his sons ; (b) he expressed the opinion that the family already had enough ; and (c) he took the view that the Act of 1916 was not intended to provide for a case where 15,000*l.* was given to a boy.

It is submitted that in dealing with an application under the Act everything can be looked at, and that the whole position must be considered. The additional 10,000*l.* asked for is a reasonable figure having regard to all the circumstances. The words of the New Zealand Act, the Family Protection Act, No. 60 of 1908, s. 33, sub-s. 1, are : " If any person . . . dies . . . without making . . . adequate provision for "the proper maintenance and support," etc., the Court may order such provision in its discretion. Reliance is placed on *In re Hawke (Deceased)*. *Hawke v. Public Trustee*. (1) The policy of the Act of 1908 is conveniently summed up in *In re Allen (Deceased)*, *Allen v. Manchester* (2), where the problem with which the Board has to deal in this case is set out : " It [the "Court"] has to judge between the claim of a dependant to be "maintained by the testator and the claim of the testator "himself to do as he pleases with his own." (3) It is a problem of life and domestic considerations, for which it is very difficult to get analogous cases. [Reference was made to *Welsh v. Mulcock*. (4)] In *Collins v. Public Trustee* (5) it was said that the Court was justified in taking a liberal view of the adequacy of maintenance. In *Allardice v. Allardice* (6) this Board held that the discretion had been rightly exercised in the Court below (7) and would not interfere with it. That case shows that, if it could be said that Nicholas J. in the present case had reviewed all the circumstances of the case, weighed them one against the other, and considered the whole position in accordance with what the authorities say that he should have done, then this Board would hesitate for a long time before saying that he had exercised his discretion wrongly.

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(1) [1935] N. Z. L. R. (Supplmt.)
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(2) [1922] N. Z. L. R. 218.

(3) *Ibid.* 222.

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(4) [1924] N. Z. L. R. 673, 683.

(5) [1927] N. Z. L. R. 746.

(6) [1911] A. C. 730.

(7) *Ibid.* 734.

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But Nicholas J., so far from considering all the circumstances of the case, really did not consider them at all, because—his judgment is very short—he really says that he does not think that the Act was intended to apply to this sort of case at all—where 15,000*l.* is left to a boy. The judge has not exercised his discretion because, having taken in limine the view that the Act did not apply at all, he has not really directed his mind to a review of the circumstances which would enable him to come to a conclusion. There having been no proper exercise of the discretion, it is now open for this Board to say upon the materials which are before it what, in all the circumstances, is an adequate provision for the proper maintenance, education and advancement in life of the appellants. The matter is at large, and it is submitted that the extra provision asked for is in the circumstances reasonable, and that no regard should be paid to possible benefits which might accrue to the appellants from their mother's will.

J. Neville Gray for the respondent Mrs. Gwendoline Bosch, the widow, said that Mrs. Bosch would welcome further provision for her children, but it was submitted that any extra provision should come out of the residuary estate: s. 6, sub-s. 1 (b), of the Act of 1916.

Evershed K.C. and *A. C. Nesbitt* for the respondents the University of Sydney. So far as the figures are concerned, when the very heavy death duties—about 75,000*l.*—have been deducted, the present sum which would pass under residue to the University of Sydney would be something between 50,000*l.* and 60,000*l.* At present about 90,000*l.* has been set aside for the widow, and 30,000*l.* for the children. It would appear, therefore, that the disproportion is not excessive. There are three matters of a somewhat general nature that have first to be considered in approaching cases of this kind: First, it is a question *prima facie* of the discretion of the Court which hears the application. If the Board thinks that the judge has misapprehended the position, the discretion vests in this Board. The local judge, however, is clearly more familiar with the facts. A person asking the Court to vary

testamentary dispositions has obviously a fairly heavy onus laid on him to satisfy the Court that the testator's disposition should to some extent be disregarded. In this case there is no evidence supplied on behalf of these two children of the kind of life they are living, where their mother is living, the society in which they move, cost of education, etc. Nor is there any evidence of there being any other source of revenue. The only matter of fact is the question of the cost of going from Sydney to Oxford or Cambridge University. The second preliminary matter is that where a statute takes away rights which ordinarily exist at common law, such as a man's right to dispose of his property, they are only taken away to the extent to which there is clear and unambiguous expression to that effect in the statute. Thirdly, it is suggested that the Board, if they think it right to vary the order of Nicholas J., and grant an increase, should give the use only of the sum increased, and let it revert to the University.

There are three questions which arise under sub-s. 1 of s. 3 : (1.) What is for the particular child in question proper maintenance, education or advancement? When the Court has reached a conclusion as to that, the next question is: (2.) Has the will—the effect of the dispositions—adequately provided for such maintenance, etc.? If the answer is "No," then (3.) taking all the circumstances into account the Court will decide whether and to what extent and how it will modify the will. The first question is the one upon which the real difficulty arises—namely, what is the proper maintenance, etc.? If the question is put in relation to any child, what is the proper maintenance for that child? It is obvious, it is submitted, that the answer cannot be £x per annum. The answer is that the child would be properly maintained if the sum spent annually on it fell within quite large limits, ranging from lavishness to parsimony: that is far from saying that there is only proper maintenance when there is every possible provision which a generous father may think fit to make. The standard is one not of generosity but of strict justice. In the same way with

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regard to education, if there is a substantial income—over 500*l.* a year, as in this case—one should not cast about, so to speak, for something which the income might not be sufficient to provide for. That reasoning applies equally to the question of “advancement in life.” It is submitted that it is that negative way of looking at the matter that forms the basis of the views of the various local Courts. The use of the word “proper” as being the fundamental point is dealt with in *In re Richardson*. (1)

The figure of 25,000*l.* which is suggested is just a figure; there is no suggestion that the extra 10,000*l.* is required for a specific purpose, or that there is any particular justice in that figure. The judges sitting in Australia, who administer these Acts according to their own knowledge of the local conditions, are given the duty of saying what is proper, and it would be dangerous, unless there were very clear evidence, that the Board, sitting in London with knowledge of the conditions in this country, should arrive at a conclusion of figures. [Reference was made to *In re Allen (Deceased)*, *Allen v. Manchester* (2); *In re Allardice*, *Allardice v. Allardice* (3); *Collins v. Public Trustee* (4); and *In re Fuller*. (5)]

H. B. Vaisey K.C. replied. This is a matter for discretion, and in all the circumstances, as the matter now stands, it is one for this Board to exercise its discretion. There has been a great deal of discussion in this class of case whether the Courts must only look at the circumstances as they existed at the moment of the testator's death, or whether they may look at subsequent events. In New South Wales, not following some of the other Australian States, it has been held that subsequent events may be looked at if justice so requires. The main point, however, is what was the position at the time of the testator's death?

Feb. 22. The judgment of their Lordships was delivered

(1) [1920] S. A. L. R. 24, 36, 40.

(4) [1927] N. Z. L. R. 746.

(2) [1922] N. Z. L. R. 218.

(5) (1917) 17 St. R., N. S. W. 348.

(3) (1910) 29 N. Z. L. R. 969, 972, 974.

by LORD ROMER. This appeal is concerned with s. 3, sub-s. 1, of a statute of New South Wales, the short title of which is the "Testator's Family Maintenance and Guardianship of Infants Act, 1916." The sub-section, so far as material for the present purpose, is as follows: "If any person (hereinafter called 'the testator') dying or having died since the 7th of October, 1915, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the Court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them."

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The circumstances in which the appeal comes before this Board are these. George Henry Bosch (hereinafter called "the testator"), who died on August 30, 1934, was married once only, namely, on October 11, 1929, to the respondent Gwendoline Bosch, then a spinster. Of that union a son was born on January 20, 1931, such son being the appellant Henry Bosch. On December 29, 1932, the testator made his will. By cl. 1 he appointed the respondents Gwendoline Bosch and Perpetual Trustee Company, Ltd., executors and trustees thereof. By clauses 3 to 10 he bequeathed to or upon trusts for the respondent Gwendoline Bosch, free of duty, divers specific and pecuniary legacies of an approximate value of 10,000*l.*, and a life annuity of 800*l.*, reducible on remarriage to 400*l.* By cl. 11 the testator directed his trustees to set aside and invest a sum of 15,000*l.* (therein called his son's fund) upon trust with such consent or at such discretion as therein mentioned to apply so much of the income thereof as his trustees should think proper for the maintenance, benefit, education or

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advancement in life of his son, the appellant Henry Bosch, until he should attain the age of twenty-five years, and upon his attaining that age upon trust for the appellant Henry Bosch absolutely. By clauses 14 and 15 the testator directed that if his said son, or any other person, should before his said son should attain the age of twenty-five years take any proceedings in Court to compel his trustees to pay any part of the capital of his son's fund, or if his said son should do, or attempt to do, any act whereby his son's fund or any part thereof, or the income or any part thereof, would or might become vested in or payable to any other person, the son's fund and any unapplied income thereof should fall into his residuary estate. By cl. 16 the testator provided that if his said son should die before attaining the age of twenty-five years without leaving any child or children him surviving, then his son's fund and all accumulations of income thereof should fall into his residuary estate. The fund and such accumulations of income were otherwise to be held in trust for such child or children as therein mentioned. By clauses 17 and 18 the testator bequeathed divers legacies of comparatively trifling amounts to persons not parties to this appeal, and by cl. 19 he devised and bequeathed the whole of his residuary real and personal estate to the respondents the University of Sydney.

On May 24, 1933, there was born a second son of the testator, namely, the appellant Edward Graham Bosch, and on July 4 of the same year the testator executed a second codicil to his will. By such codicil he increased the amount of the annuity to his wife to 1000*l.*, reducible on remarriage to 500*l.*, and directed his trustees out of his residuary personal estate to appropriate and invest the sum of 15,000*l.* and hold the same for his son Edward Graham upon trusts similar in all respects mutatis mutandis to those contained in his will in respect of the sum of 15,000*l.* therein directed to be held in trust for his son Henry.

The testator had no further children and, as already stated, died on August 30, 1934. He was a man of considerable wealth, his estate for probate purposes being sworn at the

net amount of just over 257,000*l.* This sum would have been considerably larger had it not been for the fact that in the year 1928, and therefore while still a bachelor, he had made a gift to the University of Sydney of land and personal estate of the aggregate value of 220,000*l.* or thereabouts.

The respondents, Perpetual Trustee Company, Ltd., and Gwendoline Bosch, having in due course proved the will and codicils, appropriated and set aside in satisfaction of each of the said sons' legacies of 15,000*l.* certain investments which their Lordships are given to understand will produce for each son a net annual income of 502*l.* 17*s.* 2*d.*, or 491*l.* 7*s.* 10*d.* (Australian currency), according to whether the son resides within or outside New South Wales.

Apart from the provisions made for them by the will and second codicil of the testator the two infant sons have no property or means. Their Lordships have no information whether the same observation would have been applicable to the testator's widow at the date of his death. However this may be, she took the view that the provisions made for her by her husband's will and codicil were not adequate for her proper maintenance, and on November 11, 1935, she instituted appropriate proceedings in the Supreme Court of the State of New South Wales (In Equity) under the sub-section to which their Lordships have already referred. On the same day similar proceedings were instituted by the next friend of the infant sons. The widow's application was heard on November 29, 1935, by Nicholas J. It proved successful. The learned judge ordered the trustees of the will to pay to the widow out of the estate of the testator free of all duties the sum of 33,800*l.*, and an annuity for her life of 2000*l.* a year as from the death of the testator. He further ordered that the provision so made for the applicant should be in substitution for all benefits to which she was entitled under the will and codicils other than a bequest to her of the testator's jewellery, wearing apparel, household furniture, goods and effects. It is stated on behalf of the respondents the University of Sydney that they offered no opposition to this order. Their Lordships, of course, accept that

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statement. But it is plain that the learned judge must have been satisfied that the widow had been left without adequate provision for her proper maintenance. Otherwise he would have had no jurisdiction to make the order.

The application of the infant sons came on for hearing before the same learned judge on October 23, 1936. It was supported by (amongst others) an affidavit of a Sydney solicitor, Mr. H. M. Taylor, who deposed to the following facts: That shortly before his death the testator had several discussions with the deponent with a view to the preparation of a new will; that the testator was particularly exercised in his mind upon two matters in connection with his testamentary dispositions as they then stood, such matters being, so far as material for the present purpose, (a) the effect of the forfeiture clauses contained in clauses 14 and 15 of the will, and (b) that, having regard to money values and the declining rate of interest, he had made inadequate provision for his widow and children in his will. The affidavit further stated that during these discussions it was emphasized that since the existing will was made rates of interest had considerably fallen and that it was not unlikely that they might continue to fall; that in these circumstances the testator considered that the bequests to his two children ought to be considerably increased; that he definitely determined to increase the amounts thereof, though he had not at the date of his death finally settled by how much; that while the testator expressed the view that notwithstanding he was a wealthy man he did not wish his sons to be similarly wealthy, yet he was obviously feeling that the provision he had made for each of them was quite inadequate having regard to the very large amounts he had given and was giving to the University, and also having regard to the fact that the income from the bequest of 15,000*l.* to each son would be, and would be likely to be, considerably less than the income he had anticipated when making his existing will.

The learned judge, however, declined to make any order increasing either of the two legacies. He merely ordered

that the provisions made by the will and codicil be varied by deleting clauses 14 and 15 of the will, and ordered that the trustees were to be at liberty to expend such portion of the corpus of each son's fund as they should think fit for the advancement and benefit of that son until that son should attain the age of twenty-five years. He directed the costs of all parties to the application to be paid or retained out of the estate of the testator.

On December 11, 1936, and before the last mentioned order had been drawn up, the two sons by their next friend restored their applications supported by some further evidence. Such further evidence consisted of two affidavits by the widow of the testator and an affidavit of a Mr. Murray. The widow stated that during the year ending in June, 1930, during which she and the testator travelled extensively, the testator's expenditure was approximately 6000*l.*, and that during the year ending June, 1931, they lived on the same scale; that their living expenses during the years ending June, 1933, and June, 1934, were approximately 3000*l.* and 2200*l.* respectively. She also deposed as follows: "It is my intention to ensure as far as possible that my sons should have every advantage and inducement to mould their lives and futures on lines that my late husband would have wished, and consequently, if my sons, or either of them, desire at any appropriate age to study at Oxford or Cambridge or any other University abroad, I intend that they should have the opportunity to do so."

Mr. Murray, in his affidavit, stated that after taking his degrees at the University of Sydney he proceeded to the University of Cambridge where he spent one academic year, and he estimated that the total cost of one year at the latter University, including vacations, was 750*l.* Nicholas J., however, declined to add anything to the order he had made on October 23, 1936, and ordered the next friend to pay the costs of all parties (other than the applicants) of the further hearing. A formal order was thereupon drawn up embodying the order made on October 23, 1936, and the order made on the further hearing, the whole of the order being dated

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as of December 11, 1936. It is from so much of that order as constitutes a refusal to increase the two sums of 15,000*l.*, and orders the next friend to pay the costs of the further hearing, that the present appeal has been brought to His Majesty in Council, leave for that purpose having been obtained from Nicholas J. on July 28, 1937.

Before stating the reasons given by the learned judge for taking the course that he did, their Lordships think that it will be convenient to consider carefully the language and effect of the sub-section with which the appeal is concerned.

The first thing to be noticed is that the powers given to the Court only arise when any of the persons mentioned is left without adequate provision for his or her proper maintenance, which word will be used in this judgment where necessary as including education and advancement. The use of the word "proper" in this connection is of considerable importance. It connotes something different from the word "adequate." A small sum may be sufficient for the "adequate" maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his "proper" maintenance. So, too, a sum may be quite insufficient for the "adequate" maintenance of a child and yet may be sufficient for his maintenance on a scale that is "proper" in all the circumstances. A father with a large family and a small fortune can often only afford to leave each of his children a sum insufficient for his "adequate" maintenance. Nevertheless, such sum cannot be described as not providing for his "proper" maintenance, taking into consideration "all the circumstances of the case" as the sub-section requires shall be done. In the next place, it is to be observed that, when the condition precedent to the exercise of the powers given by the sub-section is shown to be fulfilled, those powers extend to making such provision as the Court thinks fit for "such" maintenance, that is to say, for proper maintenance. The task thus imposed upon the Court is obviously one of great difficulty. Upon what principles is the Court to act in determining what constitutes proper maintenance? This

is a question that has been discussed in several cases to which their Lordships' attention has been directed. They are for the most part decisions of the New Zealand Courts. New South Wales is not the only State in Australia that has made statutory provisions of the nature now in question. Indeed, every State in Australia has done so. New Zealand appears to have been the pioneer. The provision now in force in New Zealand is contained in s. 33, sub-s. 1, of the Family Protection Act, 1908, and is in the same form for all practical purposes as the provision with which this appeal is concerned. The principal differences in language are that in the New Zealand Statute the words "maintenance and "support" are used instead of "maintenance, education and "advancement," and the Court is not in terms directed to take into consideration all the circumstances of the case, although such words would seem to be necessarily implied.

Of the cases cited their Lordships desire particularly to refer to *In re Allardice*, *Allardice v. Allardice* (1), a decision of the Court of Appeal of New Zealand that ultimately came before this Board. In that case Stout C.J. stated the principles to be followed by the Court in administering s. 33, sub-s. 1, of the Family Protection Act, 1908. They could, he said, be summarized as follows (2): (1.) That the Act is something more than a statute to extend the provisions in the Destitute Persons Act; (2.) that the Act is not a statute to empower the Court to make a new will for a testator; (3.) that the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of wife, husband or children where adequate provision has not been made for this purpose; (4.) that in the case of a widow the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves. Later on he said (3): "The whole circumstances "have to be considered. Even in many cases where the "Court comes to a decision that the will is most unjust from

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(1) (1910) 29 N. Z. L. R. 959.

(3) 29 N. Z. L. R. 970.

(2) Ibid. 969.

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 1938 "alter the testator's disposition of his property. The first
 BOSCH "inquiry in every case must be what is the need of main-
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 PERPETUAL "the testator left."
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With these observations of the Chief Justice their Lordships are in agreement. The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration. So, too, in the case of children, a material consideration is their age. If a son is of mature, or nearly mature, age, his needs both for the present and the future can be estimated without much difficulty. In the case, however, of a son of tender age, although his immediate needs can be readily ascertained, it is extraordinarily difficult even to guess what his needs may be in the future. Where, therefore, the testator's estate is a large one the Court will be justified in such a case in making provision to meet contingencies that might have to be disregarded where the estate is small. In the same case *Edwards J.* expressed himself as follows (1) : "It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it."

Their Lordships agree that in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just,

(1) 29 N. Z. L. R. 972.

rather than a fond and foolish, husband or father. This no doubt is what the learned judge meant by a just, but not a loving, husband or father. As was truly said by Salmond J. in *In re Allen (Deceased)*, *Allen v. Manchester* (1): "The Act "is . . . designed to enforce the moral obligation of a "testator to use his testamentary powers for the purpose of "making proper and adequate provision after his death for "the support of his wife and children, having regard to his "means, to the means and deserts of the several claimants, "and to the relative urgency of the various moral claims "upon his bounty. The provision which the Court may "properly make in default of testamentary provision is that "which a just and wise father would have thought it his "moral duty to make in the interests of his widow "and children had he been fully aware of all the relevant "circumstances."

In the case of *Allardice v. Allardice* (2) when it came before this Board by way of appeal, as it appeared to their Lordships that the Court of Appeal in New Zealand had exercised a discretion in the matter, the appeal was dismissed. Their Lordships, however, stated that they saw no reason to differ from the judges of the Court of Appeal in the general view they had taken as to the proper scope and application of the powers conferred upon them by the Act. Referring to the facts of the case they said (3): "These are essentially questions "for the discretion of the local Courts who are entrusted with "the administration of the Act. They are well acquainted "with all the local conditions as to employment, standard of "living, and other matters necessary to be borne in mind in "adjudicating on questions of this class, and their Lordships "would be slow to advise any interference with the discretion "founded upon such knowledge."

These observations must be carefully borne in mind in dealing with the present appeal. If the learned judge, whose decision this Board is now called upon to review, has directed himself properly as to the principles applicable to the case,

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(1) [1922] N. Z. L. R. 218 220.

(3) [1911] A. C. 734.

(2) [1911] A. C. 730.

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and in so directing himself exercised his discretion in the matter, their Lordships would indeed be slow to advise any interference with the discretion so exercised. In these circumstances it becomes necessary to consider the reasons that were given by Nicholas J. for refusing to increase the legacies provided by the testator for his two infant children.

No record appears to have been kept of what was said by the learned judge on the first occasion that their application came before him. But upon the renewal of their application on December 11, 1936, he expressed himself as follows: "The application . . . rests on a view of the Act which "appears to me to be wholly erroneous. It rests, it seems to "me, on the belief that a young man has not been given "adequate provision for his proper maintenance, education "or advancement in life unless he is able to attend one of the "English Universities. I think that is a fallacy."

He then referred to Mr. Murray's estimate of the cost of going to one of those universities as being another fallacy and said: "The application rests on the equally fallacious "belief that a young man who has the sum of 15,000*l.* in "cash has not adequate provision for his proper maintenance, "education and advancement in life. In my opinion the Act "was not intended to provide for a case of this sort at all."

Pausing there, it is to be observed that the learned judge is not dealing merely with the particular case before him. He seems to be expressing a view of the Act that is of general application; and that this is so is strongly corroborated by what he said when giving leave to appeal to His Majesty in Council. He said that the question was one of great general public importance; that a view of the Act was put forward which, to his mind, was untenable; that it was a new view of the application of the Act, and one which had not yet been considered by a Court of Appeal. Now, what was the view of the Act taken by the learned judge? It seems to have been this, that whatever the fortune left by his father might be, whatever might be his station in life, and whatever might be his plans for his future career, in other words, whatever might be the circumstances of the case, no young

man who was in possession of a sum of 15,000*l.* could bring himself within the Act, and the fact that a young man was unable, in view of the means available for his maintenance, education and advancement, to attend one of the English Universities was, in all circumstances, a wholly irrelevant consideration. Their Lordships are unable to take this view of the Act. Leaving out of consideration sums that are obviously fantastic, it cannot be said of any particular sum, such as 15,000*l.* for instance, that it affords proper maintenance, education and advancement in all conceivable circumstances. The sub-section in question contains no other limitation than is involved by the words "proper" and "all the circumstances of the case," and their Lordships would strongly deprecate the introduction into the sub-section of any limitation by reference to a particular figure, or any limitation by reference to the kind of education for which provision should be made.

But Nicholas J. gave further reasons for refusing to increase the appellants' legacies. He said this: "Nor was it" [i.e., the Act] "intended to provide for a case in which the testator 'has intended to alter his will but by an unfortunate accident 'his solicitor has not made his arrangements in time, or for 'a case in which the mother of the infant has ideas for his 'education or mode of living which she thinks entail 'a greater expenditure than is provided for in the will.'" Here again, the learned judge seems to be expressing a general view of the Act, and, here again, their Lordships, with all respect, find themselves unable to agree with him. It is true that in many, and perhaps in most, of the cases with which the Court is called upon to deal the testator has deliberately omitted to perform the duty that he owes of making proper provision for his wife and children. In such cases the intentions and wishes of the testator plainly can carry no weight with the Court. But in other cases the testator's omission to perform that duty will have been due to some mistake or oversight, and in such cases the wishes of the testator may legitimately be taken into consideration. So, too, in the case of the mother of the testator's children. If

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she appears to be a just and wise mother, her opinions and her wishes are not to be excluded from the circumstances of the case to which under the Act the Court has to pay attention, and this is especially the case where the children are of tender age.

The learned judge concluded his statement of the reasons by which he was actuated in coming to his conclusion in the following terms: "When the will is taken into consideration with the orders already made under the Testator's Family Maintenance Act this family will have an annual income in excess of what it had previously been spending; and all I can say is that on my view of this Act I cannot make any addition to the order which I have already made."

Now, one of the orders to which the learned judge was referring was the order made upon the application of the testator's widow. But the provision for her made by that order was not made subject to any condition as to her contributing thereout anything to the maintenance, education or advancement of the appellant children. That she would in fact do so if the present state of affairs were to continue may be readily conceded. But there can be no certainty that the present state of affairs will not in the future be materially altered. The widow, for instance, might remarry and have further children. Her second husband might be a man of slender means, and the provision made for her by the order of November 29, 1935, might be no more than sufficient to enable her to make provision for the proper maintenance of her second husband and the children of her second marriage. It cannot, therefore, be predicted that the appellants will benefit in any way by the order in question. In these circumstances it is not, in their Lordships' opinion, a valid reason for refusing to increase the appellants' legacies that an increase has been made in the provisions made by the testator for his widow. In considering all the circumstances of the case, the learned judge should have borne in mind that the circumstances as they exist at present will not necessarily remain unchanged, and in omitting to do so he has, in their Lordships' opinion, inadvertently misdirected himself.

For these reasons their Lordships are of opinion that the discretion of the learned judge must be reviewed, and that inasmuch as they are in possession of all the material facts they should indicate how, in their opinion, the discretionary power given to the Court by the sub-section in question should be exercised in the present case. The task of exercising the power must always be one of great difficulty and delicacy. It must always be one largely of guess-work, especially in a case like the present, which is concerned with children of tender age of whose needs in the future nothing can be predicted with any certainty. But, guiding themselves by the principles which have been discussed in an earlier part of this judgment, bearing in mind that the testator died possessed of a fortune of over a quarter of a million pounds, that he himself just before his death was of the opinion that the provision made for his sons by his will and second codicil was inadequate in the circumstances, and that he was a person who, to say the least of it, was not likely to take an exaggerated view of what would constitute proper maintenance, education and advancement, bearing in mind, also, the tender age of the appellants, and the possibility, therefore, that by the time they are of an age to embark upon a career, or to marry, the value of money and the rates of interest may be much depreciated, not forgetting the wishes of their mother as to their education, and taking into consideration all the other circumstances of the case, their Lordships have come to the conclusion that, in order to make adequate provision for the proper maintenance, education and advancement of the appellants, there should be provided, out of the residuary estate of the testator for each appellant the additional sum of 10,000*l.*, to be held by the trustees upon the same trusts in all respects as are declared by the will, or by the will and second codicil of the testator (as the case may be), as such trusts are varied by the order of Nicholas J. of December 11, 1936.

Their Lordships are therefore of opinion, and will humbly advise His Majesty, that this appeal should be allowed, that the order of Nicholas J. of December 11, 1936, should be

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J. C. varied by directing the trustees to provide out of the testator's
1938 residuary estate the two additional sums of 10,000*l.* to be
BOSCH held upon the trusts that have been indicated, and by
v. directing that the costs of all parties of the further hearing
PERPETUAL before him of the appellants' motion should be dealt with in
TRUSTEE the same manner as were the costs of the first hearing.
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The costs of all parties of this appeal must be borne by the residuary estate of the testator.

Solicitors for appellants and for the respondent Gwendoline Bosch : *Elvy Robb & Co.*

Solicitors for the respondents the University of Sydney : *Light & Fulton.*

Referred to. DOLLFUS
MIEG CASE.
[1949] 1 Ch. 389

[HOUSE OF LORDS.]

Followed. DOLLFUS
MIEG v. BANK OF
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[1950] 1 Ch. 333

Considered. SULTAN
OF JOHORE v. ABU
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COMPANIA NAVIERA VASCONGADO .

APPELLANTS ;

H. L. (E.)*

AND

STEAMSHIP "CRISTINA" AND PERSONS }

RESPONDENTS.

CLAIMING AN INTEREST THEREIN . }

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Jan. 13, 14,
17, 18, 20 ;
March 3.

International law—Vessel registered in Spain—Vessel in English port—Spanish decree requisitioning vessel—Possession of vessel taken on behalf of Spanish Government—Claim for possession by original owners—Impleading foreign sovereign State.

A ship, called the *Cristina*, belonging to the appellants, a Spanish company, and registered at the port of Bilbao, was lying in the port of Cardiff. Shortly before her arrival there, but after she had left Spain, a decree was made by the Spanish Government requisitioning all vessels registered at the port of Bilbao, and in view of this, and acting on the instructions of the Spanish Government, the Spanish consul at Cardiff went on board the *Cristina*, stated that she had been requisitioned, dismissed the master and put a new master in charge. Thereupon the appellants issued a writ in rem claiming possession of the *Cristina* as their property. The Spanish Government entered a conditional appearance, and gave notice of motion for an order that the writ should be set aside inasmuch as it impleaded a foreign sovereign State:—

Held, that the Courts of this country will not allow the arrest of a ship, including a trading ship, which is in the possession of, and which has been requisitioned for public purposes by, a foreign sovereign State, inasmuch as to do so would be an infraction of the rule well established in international law that a sovereign State cannot, directly or indirectly, be impleaded without its consent, and, therefore, that the writ and all subsequent proceedings must be set aside: *The Broadmayne* [1916] P. 64; *The Messicano* (1916) 32 Times L. R. 519; *The Crimdon* (1918) 35 Times L. R. 81; *The Gagara* [1919] P. 95; and *The Jupiter* [1924] P. 236 approved and applied.

Opinion reserved by Lord Thankerton and Lord Macmillan as to the correctness of the decision in *The Porto Alexandre* [1920] P. 30.

Observations by Lord Maugham both as to the decision in *The Porto Alexandre*, supra, and as to the position according to our law of State-owned commercial ships.

Decision of Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal affirming a decision of Bucknill J.

* Present: LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD MAUGHAM.

H. L. (E.) The appellant company issued a writ in rem claiming as
 1938 sole owners of the steamship *Cristina*, which was registered
 COMPANIA at the port of Bilbao, to have possession of the ship, then
 NAVIERA lying in the port of Cardiff, adjudged to them.
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v. The respondents were the Government of the Spanish
 S.S. Republic, who entered a conditional appearance and stated
 CRISTINA. that they were owners or parties interested. They further gave
 — notice of motion for an order that the writ and all subsequent
 proceedings should be set aside for the following reasons:—

“ That the steamship *Cristina* was at the time the writ in
 “ this action was issued the property of the Government of
 “ Spain a recognized foreign independent State and that the
 “ said State declines to sanction the institution of these
 “ proceedings in this Court. That at the time of the issue of
 “ the writ in this action the steamship *Cristina* was in the
 “ possession of the Spanish Government by its duly authorized
 “ agent. That at the time of the issue of the writ in this
 “ action the Spanish Republican Government had a right to
 “ the possession of the steamship *Cristina*. That this action
 “ impleads a foreign sovereign State, namely, the Government
 “ of Spain.”

The ground on which the Spanish Government claimed to have the writ and arrest set aside was that by a decree of June 28, 1937, they had purported to requisition all vessels registered in the port of Bilbao (including the *Cristina*), and by reason thereof they claimed that they were entitled to the possession of the *Cristina* and that they were therefore impleaded by the proceedings. It was alleged that the Spanish Consul at Cardiff had in fact requisitioned the *Cristina* in pursuance of the decree above mentioned and that the Spanish Government were in fact in possession of her through a new master appointed by the Spanish Consul.

Bucknill J. and the Court of Appeal held themselves bound by authority to decide that the Court must decline jurisdiction on the ground that a foreign sovereign State, namely, the Republic of Spain, was asserting a possessory interest in the *Cristina*, and objected to the jurisdiction of the Court.

The company appealed.

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Willink K.C., *Willmer* and *V. R. Idelson* for the appellants. There is no doctrine of immunity from the jurisdiction of the Court, established by international law, covering the present facts. As was held in *In re Blanshard* (1) the Court of Admiralty has, in a cause of possession, jurisdiction to take a vessel from a mere wrongdoer, and to deliver it to the rightful owner. In *Duke of Brunswick v. King of Hanover* (2) Lord Langdale M.R. pointed out that where our Courts have been called upon to distribute a fund in which some foreign sovereign or State had an interest, and it has been thought expedient to make such sovereign or State a party, the effect has not been to compel, or seek to compel, such sovereign or State to come in and submit to judgment in the ordinary course, but to give him or it an opportunity to come in to establish his interest in the subject-matter; the Master of the Rolls then proceeded: "Coming in to make his claim, "he would, by doing so, submit himself to the jurisdiction of "the Court in that matter." There the possibility of a foreign sovereign being a defendant was envisaged. But in this case the Spanish Government was not a defendant. The proceeding was a writ in rem.

[LORD ATKIN referred to Dicey's Conflict of Laws, 5th ed., p. 194, where it is said that "no action or other proceeding "can be taken in the Courts of this country against a foreign "sovereign, nor can the property of a foreign sovereign be "seized or arrested, even if it be merely a ship engaged in "commerce."]

There is no adverse comment in Dicey on the rule laid down by Lord Langdale. In *Vavasseur v. Krupp* (3), where the Mikado intervened in a suit to claim the property of certain shells, the Court held that he was entitled to them, but it is to be noted that he proved his property in them, so that the decision did not rest on his mere assertion of property. In *The Parlement Belge* (4), it was held that an unarmed

(1) (1823) 2 B. & C. 244.

(2) (1844) 6 Beav. 1, 39.

(3) (1878) 9 Ch. D. 351.

(4) (1880) 5 P. D. 197.

H. L. (E.) packet belonging to the sovereign of a foreign State, in the hands of officers commissioned by him, and employed in carrying mails, was not liable to be seized in a suit in rem to recover redress for a collision and that this immunity was not lost by reason of the fact that the packet also carried merchandise and passengers for hire. It will be observed, however, that the ship there in question was the property of the foreign State. In the present case the vessel is on the Bilbao register as the property of the appellants and it arrived in this country with that status. It will no doubt be contended that the effect of the Spanish decree requisitioning all ships on the Bilbao register transferred the right to possession of the ship to the Spanish Government. That decree, however, can have no extra-territorial force: see *Russian Bank for Foreign Trade v. Excess Insurance Co.* (1) A ship, the property, and in the possession, of a private person or body which comes within the jurisdiction of His Majesty, cannot while here be taken out of that possession by some one merely alleging that he is the representative of a foreign Power. The writ did not implead the Spanish Government or call upon it to intervene. The fundamental concept of international law is that each country is omni-competent within its own jurisdiction. Except in so far as it can be shown that the sovereign of this realm has voluntarily abandoned his sovereign rights, his Courts are entitled to adjudicate upon all matters arising within the territorial jurisdiction. Apart from what has already been specifically recognized, the burden is upon a foreign State to show that our Courts have abandoned jurisdiction in a matter which they have begun to assert when the writ in rem has been issued. As was pointed out in *The Exchange* (2) a man-of-war which was allowed to come into a harbour of the United States, came in under an implied licence. So a sovereign comes in on the like conditions. With regard to the requisition cases, *The Broadmayne* (3); *The Messicano* (4), and *The Crimdon* (5), none of these dealt

(1) [1918] 2 K. B. 123.

(2) (1812) 7 Cranch, 116.

(3) [1916] P. 64.

(4) (1916) 32 Times L. R. 519.

(5) (1918) 35 Times L. R. 81.

with a position like the present where it is sought to enforce a Spanish municipal decree against property within His Majesty's jurisdiction. *The Jupiter* (1), upon which the Court of Appeal based its decision, was wrong and should be overruled.

G. St. C. Pilcher K.C., Owen L. Bateson and John Foster for the respondents. The appellants are seeking to limit a well established principle of law that a foreign sovereign State cannot be impleaded in our Courts against its will. The two matters for consideration are (a) Do these proceedings implead the Spanish Government? and (b) If they do, what is the extent of that Government's immunity in the circumstances of the case? In considering the former of these questions it has to be considered whether the Spanish Government through its agent, the Consul, had de facto possession of the vessel at the time of the issue of the writ? To that question, on the evidence, there can be no doubt that it had possession, and, as its right thereto is disputed by the appellants, the Spanish Government is obviously impleaded. Where a foreign Government is impleaded, its immunity from the jurisdiction of our Courts is absolute. There may be apparent exceptions, but in these it must be taken that the foreign State has impliedly submitted to the jurisdiction. What was done by the Spanish Consul was done on the instructions of the Spanish Government. In *The Broadmayne* (2) a vessel requisitioned by the Government was held to belong to the class of things, described in *The Parlement Belge* (3) as "things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession and judicial sale incident to such proceedings would divert them from those public uses to which they are destined." The present case comes directly within the decision of the Court of Appeal in *The Gagara* (4), where it was held that to permit the arrest of a vessel belonging to the Esthonian Government would be

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(1) [1924] P. 236.

(2) [1916] P. 64.

(3) 5 P. D. 197, 210.

(4) [1919] P. 95.

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contrary to principles of international comity, as it would compel that Government, whose sovereignty was entitled to be respected, to submit to the jurisdiction of the British Courts, and accordingly in that case the writ and all subsequent proceedings were set aside. See to the same effect *The Porto Alexandre*. (1) To purport to requisition the vessel as belonging to a port within the jurisdiction of the Spanish Government was in no way objectionable : see *The Adriatic*. (2) *Willink K.C.* replied.

The House took time for consideration.

1938. March 3. LORD ATKIN. My Lords, the circumstances in which the writ in this action was issued and the *Cristina* was arrested have been set out in the opinion of my noble and learned friend Lord Wright, which I have had the advantage of reading, and I need not repeat them.

The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.

I draw attention to the fact that there are two distinct immunities appertaining to foreign sovereigns : for at times

(1) [1920] P. 30.

(2) (1919) 258 Fed. Rep. 902.

they tend to become confused : and it is not always clear from the decisions whether the judges are dealing with one or the other or both. It seems to me clear that, in a simple case of a writ in rem issued by our Admiralty Court in a claim for collision damage against the owners of a public ship of a sovereign State in which the ship is arrested, both principles are broken. The sovereign is impleaded and his property is seized.

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In my opinion the facts of this case establish the same breach of the two principles as in the illustration just given. I entertain no doubt that the effect, and the intended effect, of the action of the Spanish Consul at Cardiff in July, 1937, was to "purge" the officers and crew of the ship of those who were disaffected to the present Spanish Government and to secure that the new master, officers, and crew should hold the ship for the Government : and that from and after July 14 the master, officers, and crew held the ship not for the owners but for the Government : and that by the master, officers, and crew the Government were in fact in possession of the ship. I cannot pay serious attention to the suggestion that all that the Consul intended to do was to supply a well affected new master on behalf of the owners.

These being the facts I come to the conclusion that when the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel *Cristina* and all persons claiming an interest therein, in the body of which the same ship and all persons claiming an interest therein were commanded within eight days to cause an appearance to be entered for them in the Probate, Divorce, and Admiralty Division, and on which they indorsed the claim to have possession adjudged to them of the said steamship or vessel *Cristina*, they were directly impleading the Spanish Government, whom they knew to be the only persons interested in the *Cristina* other than themselves, and from whom they desired that possession should be taken after it was adjudged to them. We have had an interesting exposition of the history of Admiralty practice and the evolution of the writ in rem. It is plain that it began with the arrest of a named

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defendant ; in his absence any of his property in the jurisdiction including his ship or ships could be arrested : eventually the ship over which some maritime claim was asserted could alone be arrested. But in all cases as in the present practice when a defendant has appeared the claim is against him personally, and though it is enforced in the first instance by sale of the ship or enforcement of the bail, a damage claim is not in our jurisprudence limited to the value of the ship. In these days it is unusual to name defendants : when the defendants are described as " the owners of a vessel " they can be at once identified. When persons are not entitled the defendants but in the body of the writ are cited to appear as persons claiming an interest, there is said to be some uncertainty whether they appear under leave to intervene or without such leave. In any case when they do appear they appear as defendants, and as such I conceive that they are impleaded. And, when they cannot be heard to protect their interest unless they appear as defendants, I incline to hold that, if they are persons claiming an interest, they are by the very terms of the writ impleaded. But in the present case where persons claiming an interest are the only persons entitled defendants, and the Spanish Government are the only persons claiming an interest adverse to the plaintiffs, I have no doubt not only that the Government were in fact impleaded but were intended by the plaintiffs to be impleaded.

The second point seems to me if possible to be clearer. It is well established that the Court will not arrest a ship which is under the control of a sovereign by reason of requisition : *The Broadmayne* (1) ; *The Messicano* (2) ; *The Crimdon*. (3)

But the present case is not one of control for public purposes but of actual possession for public purposes. It is indistinguishable from *The Gagara* (4), which in the Court of Appeal was decided solely on the ground that the ship was in the actual possession of a foreign sovereign—namely, the State of Esthonia. The Courts of our country will not

(1) [1916] P. 64.

(2) 32 Times L. R. 519.

(3) 35 Times L. R. 81.

(4) [1919] P. 95.

allow their process to be used against such a ship and the arrest cannot be maintained. In the present case I find it unnecessary to decide many of the interesting points raised in the argument for the appellants as to whether the ship was rightly in the possession of the Government, what was the extraterritorial effect of the Spanish decree, what implied restrictions in different circumstances might be attached to sovereign immunity, when, if ever, the assertion of the sovereign as to his property or possession is conclusive. In matters of such grave importance as those involving questions of international law it seems to me very expedient that Courts should refrain from expressing opinions which are beside the question actually to be decided. In the present case in my opinion the decisions of the trial judge and the Court of Appeal were right and should be affirmed; and this appeal should be dismissed with costs.

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LORD THANKERTON. My Lords, in my opinion, on the facts in this case, the decisions of the trial judge and of the Court of Appeal were right and should be affirmed.

It is admitted that the Government of the Republic of Spain is the Government of a foreign sovereign State fully recognized as such by His Majesty's Government. In my opinion it is sufficiently established that the Spanish Government, without a breach of the peace, obtained by their agents de facto possession of the ship on July 14, 1937, and have since remained in de facto possession. I am further of opinion that it is sufficiently established that such possession is for public uses, for the purposes of prosecution of the civil war in Spain. The Spanish Government decline to submit to the jurisdiction, and it has not been maintained by the appellants that there are any facts from which such submission can be implied.

I agree with my noble and learned friend on the Woolsack that in the present case not only were the Spanish Government in fact impleaded, but they were intended to be so impleaded. Further, the order sought in the present case would necessarily displace the de facto possession of the

H. L. (E.) Spanish Government, and I agree with my noble and learned
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friend that the doctrine of immunity of the property of a foreign sovereign State dedicated to public uses includes the case of actual possession for public uses. In this view, the case clearly comes within the principles laid down in *The Parlement Belge* (1) by Brett L.J.

But, my Lords, I have some doubt whether the proposition that the foreign sovereign State cannot be impleaded is an absolute one; the real criterion being the nature of the remedy sought. To indicate this, let me quote the principles laid down in *The Parlement Belge* (1), where Brett L.J. said (2): "The first question really raises this, whether "every part of the public property of every sovereign authority "in use for national purposes is not as much exempt from "the jurisdiction of every Court as is the person of every "sovereign. Whether it is so or not depends upon whether "all nations have agreed that it shall be, or in other words, "whether it is so by the law of nations. The exemption of "the person of every sovereign from adverse suit is admitted "to be a part of the law of nations. An equal exemption "from interference by any process of any Court of some "property of every sovereign is admitted to be a part of "the law of nations." This passage suggests that the absolute exemption is of the person of the sovereign from adverse suit, but that in the case where property of a sovereign is not admitted by the agreement of nations to be exempt, action in rem against such property which is within the territorial jurisdiction is available, even if the sovereign be invited to contest the suit, if he so choose.

It happens that *The Parlement Belge* (1) affords an interesting illustration, for Sir Robert Phillimore (3) had rejected the claim to exemption, and his grounds are stated in the following passage: "Looking to the character of the suit and to other "passages in the judgment" [Judge Story's judgment in *The Santissima Trinidad* (4)]: "it seems to me clear that by the "expression 'public ship of the government' was meant a

(1) 5 P. D. 197.

(2) *Ibid.* 205.

(3) (1879) 4 P. D. 129, 148.

(4) (1822) 7 Wheat. 283.

“ship of war, and not any vessel employed by the government. H. L. (E.)
 “But even if the term could be treated as more comprehensive 1938
 “and as including public ships such as I have referred to COMPANIA
 “sent by the government on exploring expeditions, it would NAVIERA
 “not include a vessel engaged in commerce, whose owner is VASCONGADO
 “(to use the expression of Bynkershoek, De Leg. Mercatore) v.
 “‘strenuè mercatorem agens.’ Upon the whole, I am of S.S.
 “opinion that neither upon principle, precedent, nor analogy CRISTINA.
 “of general international law, should I be warranted in Lord
 “considering the *Parlement Belge* as belonging to that category Thankerton.
 “of public vessels which are exempt from process of law and
 “all private claims.”

In the Court of Appeal, in delivering the judgment of the Court, Brett L.J. held that the exemption was not confined to ships of war, but applied to ships and other property of the sovereign destined to public uses. He then went on to consider whether the *Parlement Belge* was so dedicated, and came to the conclusion that it was so dedicated, because its use for purposes of trade was only subservient to the main purpose of carrying the mails. Then comes a striking passage in the judgment (1): “The ship is not in fact brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner.” It may be argued, as a logical inference from this passage, that an action in rem against property of the sovereign which is engaged in private trading, and which is not dedicated to public uses, is not

(1) 5 P. D. 220.

H. L. (E.) to be regarded as inconsistent with the independence and equality of the state represented by such owner, and that any other view would lead to absolute exemption of all property owned by the sovereign, and not the exemption of some property only.

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If that were the correct inference, it would not justify the view of the Court of Appeal in the case of *The Porto Alexandre* (1), where the ship was being used in ordinary commerce, the earning of freight being the sole interest of the Portuguese Government, who owned it, that they were bound to hold it exempt by reason of the decision in *The Parlement Belge*. (2) They made no inquiry as to whether such an exemption was generally agreed to by the nations, and it seems to be common knowledge that they have not so agreed. This question, which has come to be of increasing importance of recent years, has not been considered by this House, and as I hold that the *Cristina* was dedicated to public uses, I find it unnecessary to decide it in this appeal. Accordingly, I express no opinion on the matter, but I desire to make clear that I hold myself free to reconsider the decision in *The Porto Alexandre*. (1) In the later case of *The Jupiter* (3) counsel for the appellants conceded that he was precluded by the decision in *The Porto Alexandre* (1) from raising this question in the Court of Appeal.

I concur in the motion proposed by the noble and learned Lord.

LORD MACMILLAN. My Lords, various topics of the first importance were mooted in the course of the argument on this appeal which it is unnecessary and inexpedient to discuss, but it may not be out of place to indicate the general principles which provide the setting for the particular problem which your Lordships have to solve.

It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial

(1) [1920] P. 30.

(2) 5 P. D. 197.

(3) [1924] P. 236.

limits and in all causes civil and criminal arising within these limits. This jurisdiction is exercised through the instrumentality of the duly constituted tribunals of the land. But just as individuals living in a community find it expedient to submit to some diminution of their freedom of action in favour of their fellow-citizens, so also the sovereign States which constitute the community of nations have been led by courtesy as well as by self-interest to waive in favour of each other certain of their sovereign rights. The extent of these mutual concessions and their recognition is primarily a matter of international, not of domestic law, and as must necessarily be the case with all international law, which has neither tribunals nor legislatures to define its principles with binding authority, there may be considerable divergence of view and of practice among the nations. Hence, when questions involving international law arise in the domestic courts of a State problems of great difficulty and gravity may emerge.

“It is a trite observation that there is no such thing as a “standard of international law extraneous to the domestic “law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body “of doctrine regarding the international rights and duties of “states which has been adopted and made part of the law “of Scotland.” These are the well-chosen words of Lord Dunedin, when Lord President of the Court of Session in Scotland, in a case which raised important issues of international law: *Mortensen v. Peters*. (1)

Now, it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions. It is manifestly of the highest importance that the Courts of this country before they give the force of law within this realm to any doctrine of international law should be satisfied that it has the hallmarks of general assent and reciprocity.

(1) (1906) 8 F. (J. C.) 93, 101.

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H. L. (E.) I confess that I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect. On the contrary the subject is one on which divergent views exist and have been expressed among the nations. When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the Courts of this country was first formulated and accepted it was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined. It is only in modern times that sovereign States have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances.

I recognize that the Courts of this country have already, in cases which have been cited at the Bar, gone a long way in extending the doctrine of immunity; but the cases which have gone furthest have not been hitherto considered in this House, and like my noble and learned friend Lord Thankerton I desire to reserve my opinion on the question raised in the case of *The Porto Alexandre*. (1)

With these observations I am content to express my agreement with what I understand to be the opinion of all your Lordships that this action, which is directed to take—ultimately, if necessary, by force—a Spanish ship requisitioned for public purposes by the duly recognized Government of Spain and lying in a British port out of the possession of that Government, cannot be allowed to proceed in the Courts of this country.

LORD WRIGHT. My Lords, the appellants, who are a Spanish company carrying on the business of ship-owners

at Bilbao in Spain, initiated this action by a writ in rem in the Admiralty Division claiming as sole owners of the steamship *Cristina* to have possession adjudged to them of the steamship. The writ was against the steamship or vessel *Cristina* and all persons claiming an interest therein. The *Cristina*, which is a Spanish steamship registered at the port of Bilbao, was on July 22, 1937, the date of the writ, lying in Queens Dock, Cardiff, where she had arrived on July 8, 1937. At that latter date she was in charge of a captain named Faustino Frias appointed by and acting for the appellants, who were operating her. On July 9, 1937, he attended at the office of the Spanish Consul at Cardiff, as Spanish shipmasters are bound to do by Spanish law on arriving at a foreign port, when he was handed a letter from the Consul requiring him to produce at the Consulate the Patente de Navegacion so that it could be noted in accordance with a decree of the Spanish Government dated June 28, 1937, requisitioning the ship. The captain failed to do so and on July 13, 1937, the Consul, by registered letter, dismissed the captain and also all other officers and members of the crew not in sympathy with his Government. On the following day the Consul went on board with one Santiago Asolo, a new master whom he had appointed in the name of the Government of the Republic of Spain, and broke open the captain's cabin, which was locked, but found that the late captain, who had left the ship, had taken away the Patente de Navegacion. The new captain was placed in charge of the vessel on behalf of the Spanish Government and has remained so, save for a period when he was absent for family reasons, when he left the ship in charge of a mate, also appointed by the Consul for the Spanish Government. The master and mate have sworn that at all material times they and the crew have had continuous possession of the ship on behalf of the Spanish Government and have held themselves and the ship at that Government's disposal, subject to the arrest by the Court, which was effected by a warrant issued on the appellants' application supported by affidavits. It is also sworn that the ship's expenses have been disbursed by

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The Spanish Consul at Cardiff, who acted with the authority of the Spanish Consul-General and the Spanish Ambassador in London, claimed to requisition the *Cristina* in virtue of a decree dated at Valencia June 28, 1937, and published in the *Gaceta de la Republica* on June 29, 1937, which provided that all the vessels registered at the port of Bilbao should be requisitioned and be at the disposal of "the legitimate Government of the Republic," and that any Spanish ship-owner or owner of a vessel so registered should be bound to hand over its administration to the bodies designated by the Government for the purposes of receiving orders and instructions in relation to the service to be rendered by the vessel. The decree recited (inter alia) that in order the better to be able to meet the requirements of the war the Government considered it desirable to exercise immediate and direct control over services of marine transport in order to carry into effect the plans of supplies, evacuation or anything which the Government might wish to carry out. The decree was stated to be directed to control and administer the means of marine transport. It also contained various ancillary provisions, and in particular required entries to be made in the appropriate registers and ships' papers of any requisition under the decree.

On July 27, 1937, the respondent entered a conditional appearance "as owners or persons interested in this action, "without prejudice to an application to set aside the writ or "service thereof." On the same day it lodged a notice of motion claiming that the writ, the arrest and all subsequent proceedings should be set aside on the grounds that the *Cristina* was the property of the Government of Spain, a foreign independent State, which declined to sanction the proceedings, that the *Cristina* was in the possession of the Government by its duly authorized agent, that the Government had a right to the possession of the *Cristina*, and that the action impleaded a foreign sovereign State—namely, the Government of Spain. Among the affidavits in support of

the application was one from the Counsellor of the Spanish Embassy in London, affirming on oath that by virtue of the decree the Government of Spain "claims and is entitled to "possession of the said ship under the said requisition." He further deposed that the Government of Spain was unwilling to submit to the jurisdiction of the Court and that the proceedings impleaded that Government. He also deposed that the requisition had been effected at Cardiff by notices from the Consul at Cardiff to the captain, agents and cargo owners of the ship and to the Port and Immigration Authorities there.

At the trial Bucknill J. granted the application and set aside the writ, arrest and proceedings. His decision was affirmed by the Court of Appeal, from whose order this appeal is now brought to this House.

At the trial it was admitted on behalf of the appellants that the respondent, the Republican Government of Spain, is an independent sovereign State, recognized by His Majesty's Government. It was not contested that this admission involved that the Republican Government was the sole Government recognized by His Majesty's Government in and for Spain. The case has accordingly proceeded throughout on that footing. This House and the Courts below have thus no judicial knowledge save as appears from the recitals in the decree of the conflict which it is general knowledge is going on in Spain, or the division of territory between the contesting forces.

It has also been admitted that the *Cristina* was not in Spanish territorial waters from the date of the decree until the date of the facts alleged to constitute the requisition, when she was in British territorial waters.

The respondent Government does not contend that it is the owner of the *Cristina* but says that it is and was at all material times in de facto possession of the *Cristina* and was therefore without its consent impleaded by the writ in rem claiming possession adversely to its actual possession. Such a proceeding, it contends, is inconsistent with its position as an independent sovereign State recognized by His Majesty's Government. It further contends that the action involved

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 1938 coupled with actual possession acquired by reason of the
 COMPANIA requisition. This, though not ownership, is, it is said, a right
 NAVIERA in the ship in the nature of property and was, as being the
 VASCONGADO property of an independent sovereign State, immune from
 v. the interference of the Court either by the arrest or by an
 S.S. order annulling the requisition and giving possession to the
 CRISTINA. appellants and ousting the respondents from possession.
 Lord Wright. The word "requisition," while not a term of art, is familiar
 and has been constantly used to describe the compulsory
 taking by Government, invariably or at least generally, for
 public purposes of the user, direction and control of the ship
 with or without possession. In my judgment both contentions
 are well founded, and the order of the Courts below may be
 sustained on either ground. But the grounds are separate
 and call for separate analysis, though both alike are based
 on the general principles of international law, according to
 which a sovereign State is held to be immune from the
 jurisdiction of another sovereign State. This is sometimes
 said to flow from international comity or courtesy, but may
 now more properly be regarded as a rule of international law,
 accepted among the community of nations. It is binding on
 the municipal Courts of this country in the sense and to the
 extent that it has been received and enforced by these Courts.
 It is true that it involves a subtraction from the sovereignty
 of the State, which renounces pro tanto the competence of
 its Courts to exercise their jurisdiction even over matters
 occurring within its territorial limits, though to do so is *prima*
facie an integral part of sovereignty. The rule may be said
 to be based on the principle "*par in parem non habet*
"imperium," no State can claim jurisdiction over another
 sovereign State. Or it may be rested on the circumstance that in
 general the judgment of a municipal Court could not be en-
 forced against a foreign sovereign State, or that the attempt to
 enforce might be regarded as an unfriendly act. Or it may
 be taken to flow from reciprocity, each sovereign State within
 the community of nations accepting some subtraction from
 its full sovereignty in return for similar concessions on the

side of the others. I need not discuss other possible explanations. The rule is naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights. There may indeed be particular and special exceptions not necessary here to discuss. The principle has been received and applied by the Courts of this country in many decided cases, and in particular many cases dealing with states of fact similar to the facts here in question. But the rule only applies as between sovereign States recognized as such by His Majesty's Government. For purposes of the present case so far as concerns Spain, the respondent is such a sovereign.

The first of the two rules here relevant, namely, that the independent sovereign may not be directly or indirectly impleaded in the Courts of this country without its consent, has been recognized as a general proposition in many cases, as for instance *Mighell v. Sultan of Johore* (1), an action in personam. Similarly in *Duff Development Co. v. Kelantan Government* (2), Lord Cave referred to the right of an independent sovereign State by international law to the immunity against legal process which was defined in *The Parlement Belge* (3), and Lord Sumner said (4): "The principle is well settled, that a foreign sovereign is not liable to be impleaded in the municipal Courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection." The principle is stated without any special reference to reciprocity, but *The Parlement Belge* (3) shows clearly that a sovereign may be impleaded as much by an action in rem as by an action in personam. As was said by the Privy Council in *Young v. S.S. Scotia* (5): "Where you are dealing with an action in rem for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner." In *The Parlement*

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(1) [1894] 1 Q. B. 149.

(2) [1924] A. C. 797, 805.

(3) 5 P. D. 197.

(4) [1924] A. C. 822.

(5) [1903] A. C. 501, 504.

H. L. (E.) *Belge* (1) (a case to which I shall later refer in connection with the immunity of the sovereign's property) the action in rem was brought under a claim for collision damage done by a Belgian State mail packet. It was contended that the sovereign was not impleaded (sc. personally) but only the res. Brett L.J. in delivering the judgment of the Court of Appeal (2) said that *The Bold Buccleugh* (3) decides that an action in rem is a different "action from one in personam" and has a different result. But it does not decide that "a Court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any Court." I think the substantial soundness of this ruling is corroborated by considering the nature of the modern writ in rem. The history and effect of that writ have been fully explored by Jeune J. in *The Dictator* (4), approved and followed by the Court of Appeal in *The Gemma*. (5) It seems that originally the warrant was issued for the purpose of compelling the defendant to appear and submit to the Court, and was directed not merely against the property said to be the instrument of injury but any property of the defendant or even himself personally. But the modern writ in rem has become a machinery directed against the ship charged to have been the instrument of the wrongdoing in cases where it is sought to enforce a maritime or statutory lien, or in a possessory action against the ship whose possession is claimed. To take the present case the writ names as

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(1) 5 P. D. 197.

(2) Ibid. 219.

(3) (1851) 7 Moo. P. C. 267.

(4) [1892] P. 304.

(5) [1899] P. 285.

defendants the *Cristina* and all persons claiming an interest therein, and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel) and gives notice that in default of so doing the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment in rem is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which on the facts I have stated they beyond question de facto enjoy. The writ by its express terms commands the defendants to appear or let judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett L.J. the independent sovereign is thus called upon to sacrifice either its property or its independence. It is, I think, clear that no such writ can be upheld against the sovereign State unless it consents. It is therefore given the right, if it desires neither to appear nor to submit to judgment, to appear under protest and apply to set aside the writ or take other appropriate procedure with the same object. It may be said that it is indirectly impleaded, but I incline to think that it is more correct to say that it is directly impleaded. The defendants cited are "all persons claiming an interest in the *Cristina*," a description which precisely covers on the facts of the case the Spanish Government and, to judge by the affidavits filed by the appellants in applying to obtain the warrant to arrest, no one else; under the modern and statutory form of a writ in rem, a defendant who appears becomes subject to liability in personam. Thus the writ in rem becomes in effect also a writ in personam. This emphasizes the view that the writ directly impleads the Spanish Government.

The crucial fact in this connection is simply that de facto possession was enjoyed by the Spanish Government. The position would obviously have been quite different if the respondent were seeking to obtain possession by the process of the Court instead of resisting an attempt by the process of the Court to oust it from actual possession.

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H. L. (E.) In the present case, the fact of possession was proved.
 1938 It is unnecessary here to consider whether the Court would
 COMPANIA act conclusively on a bare assertion by the Government that
 NAVIERA the vessel is in its possession. I should hesitate as at present
 VASCONGADO advised so to hold, but the respondent here has established
 v. the necessary facts by evidence.
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It is unnecessary to consider by what mode the respondent obtained possession. It is enough to ascertain that it had possession at the time when the claim to immunity was made. Nor is it necessary to consider here whether any particular person not entitled to diplomatic immunity has made himself liable to English law.

The appellants have contended that the rule that the sovereign cannot be impleaded is not absolute or universal, and have instanced as possible exceptions cases in which title to real property in the jurisdiction, or suits to administer a fund in Court in which the foreign sovereign is interested, or representative actions such as debenture-holders' actions where the sovereign holds debentures. Whatever may be the position in such cases, they are essentially different from, and afford no guidance for, the present case, and I do not need here to discuss them.

This ground would by itself, subject to some questions to be considered below, be enough to entitle the respondent to succeed, but there is a second ground on which the writ should in my judgment be set aside, which is that it claims to interfere with the property of the foreign sovereign. That the Court has in general no jurisdiction to do this is illustrated by *The Parlement Belge*. (1) One ground of the decision that the writ should be set aside was that it was in rem against the Belgian packet. Brett L.J. enforces the principle by a copious citation of English and United States authorities and rightly concludes (2): "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign

(1) 5 P. D. 197.

(2) Ibid. 214.

“state, each and every one declines to exercise by means of
 “its Courts any of its territorial jurisdiction over the person
 “of any sovereign or ambassador of any other state, or over the
 “public property of any state which is destined to public use, or
 “over the property of any ambassador, though such sovereign,
 “ambassador, or property be within its territory, and, therefore,
 “but for the common agreement, subject to its jurisdiction.”

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The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons. In the first place they have relied on the fact that the Spanish Government had no property (in the sense of ownership) in the *Cristina*, whereas in *The Parlement Belge* (1) the Belgian Government was the owner of the mail packet. But the rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest, which may be not merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a Government, where in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign State, is subject to its direction and employed under its orders. That was a separate ground in *The Porto Alexandre* (2), apart from the question whether, or fact that, the vessel had actually become the property of the Portuguese Government, which was possessing and employing her. A similar immunity from arrest was upheld in favour of the British Crown in *The Broadmayne* (3), a vessel requisitioned by the British Government under what was in fact a compulsory charterparty and hiring. The Government, it was held, could not be deprived by the order of the Court of her services nor could the Court interfere with her so long as she was in the Crown's employment, though any rights against the owners not affecting the user by the Crown, were preserved. This latter point does not arise in actions for possession, as contrasted with actions claiming a lien. Similarly in *The Jupiter* (4) no question of ownership of the vessel was involved ; all that clearly appears from the report is that the vessel,

(1) 5 P. D. 197.

(2) [1920] P. 30.

(3) [1916] P. 64.

(4) [1924] P. 236.

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being a Russian vessel, was in the possession and subject to the control of the Russian Soviet Government, which claimed the right to possession under a master holding for it. A writ in rem for possession was set aside. The Court of Appeal obviously treated the facts as sufficient to bring the case within the rule which Scrutton L.J. quoted from Dicey, 3rd ed., p. 215: "The Court has no jurisdiction to entertain "an action against any foreign sovereign. Any action against "the property of a foreign sovereign is an action or proceeding "against such person." In my judgment on the facts of the present case the requisitioning of the *Cristina* under the decree of June 28, 1937, gave the Spanish Government a right or interest in the *Cristina* whether called property or not, which was immune from interference by the Courts of this country.

The Court of Appeal rightly, as I think, treated the case as concluded in substance by *The Jupiter*. (1) It has, however, been strenuously contended that the decision in *The Jupiter* (1) does not govern this case because the requisition was there effected within the jurisdiction of the requisitioning State, whereas in the present case the Spanish Government seized the *Cristina* in British territorial waters. It was said that such seizure constituted a wrongful act which was a breach of international comity and excluded a right to claim the reciprocal comity of immunity. The famous judgment of Marshall C.J. in *The Exchange* (2) was also relied on as resting the immunity on a licence in favour of the sovereign State which brings its own property within the alien jurisdiction on the footing of the licence, whereas no such licence can be implied when the vessel has entered the jurisdiction in the owner's possession and has then been wrongly seized. It was also said that the judgment of the Courts below, if upheld, would enable a foreign sovereign State to effect unlawful seizures in this realm of chattels or property without either the State itself or its agents being under any liability civil or criminal. But in my judgment these objections are ill conceived. I do not think Marshall C.J. had any such

(1) [1924] P. 236.

(2) 7 Cranch, 116.

idea in mind when he referred to an implied licence under which the foreign vessel entered the jurisdiction. His expressions were apt in regard to the facts before him, but were not intended to limit or define the immunity which follows not so much from the fiction of a licence, as from the independent status in international law of the foreign sovereign. This gives the sovereign, so far as concerns Courts of law, an immunity even in respect of conduct in breach of the municipal law. The remedy, if any, is *prima facie* by diplomatic representation or other action between the sovereign States, not by litigation in municipal Courts. Whatever the consequences which in any particular case may follow from this immunity it is too well established in the law of this country to admit of being infringed. It must also be noted in the present case that the *Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land. But as the relevant fact here is that the Spanish Government had in fact requisitioned her there is no need to consider whether in any sense, or to any extent, she was subject while in English territorial waters to the law of her flag, or to the operation of the Spanish decree. Nor is it necessary, even if it be competent, for the Court to debate whether the decree was validly made under Spanish law. I do not think that *The Jupiter* (1) admits of any solid distinction because of the fact that *The Jupiter* (1) was requisitioned within the territorial jurisdiction of the Soviet State.

A further point raised by the appellants was that the *Cristina* was a private merchant vessel employed in trading, whereas in *The Parlement Belge* (2) the Court of Appeal was careful to point out that the vessel was mainly used for carrying the mails and that the carrying of passengers and merchandise was subsidiary, and it is said that the Court of Appeal in *The Parlement Belge* (2) would have refused to recognize the respondent's immunity in the facts of this case. The contention seems to be that the *Cristina* was a tramp steamer which its owners had employed in ordinary trading

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(1) [1924] P. 236.

(2) 5 P. D. 197.

H. L. (E.) and in the carriage of commercial cargoes, and that in regard to such a vessel the foreign sovereign State could not claim immunity either on the ground of property or possession nor could it claim immunity from being impleaded by an action in rem against the ship. It might be enough to say in answer to these arguments that the circumstances under which the respondent took possession of the *Cristina*, particularly in view of the recitals to the decree, sufficiently bring the *Cristina* within the description of public property of the State destined to public use. This is the general criterion postulated by the Court of Appeal in *The Parlement Belge* (1), but that Court never intended to lay down that a trading vessel must be deemed to be as a matter of law outside the sphere of immunity. The main contention of the plaintiffs in that case was that the immunity was limited to ships of war, and a few other types of vessels such as royal yachts, transports, and a few others. It was no doubt in regard to armed ships of war that the immunity of ships was first recognized, as in *The Exchange*. (2) But as Sir H. S. Giffard S.-G. pungently pointed out in argument in *The Parlement Belge* (3): "The "privilege depends on the immunity of the sovereign, not on "anything peculiar to a ship of war, though it seldom arises "as to anything else, because hardly anything belonging to "a sovereign in his public capacity, except a ship of war, "ever goes wandering into the jurisdiction of foreign courts." Times, however, have changed, and the general principle must override the particular instance and be adapted to the new conditions. Indeed the *Parlement Belge* might be fairly described as a commercial vessel, since mails are more often than not carried by private ships. In *Young v. S.S. Scotia* (4) the vessel held to be immune as a public vessel was a train ferry owned by the Crown and to be employed to carry trains between two points on a railway owned by the Government of Canada. In *The Jassy* (5) Barnes P. upheld the immunity in the case of a vessel which was the

(1) 5 P. D. 197.

(2) 7 Cranch, 116.

(3) 5 P. D. 202.

(4) [1903] A. C. 501.

(5) [1906] P. 270.

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property of the State of Roumania and employed for the public purposes of the State in connection with the national railways of Roumania. But the most signal development of the principle has been during the Great War, during which the importance to the State of trading vessels became fully realized. This development was most uncompromisingly expressed in a judgment of the Supreme Court of the United States in *Berizzi Brothers Co. v. S.S. Pesaro*. (1) That was an action in rem brought against an Italian ship for damages for failure to carry a parcel of silk shipped for carriage from Italy to New York. The ship belonged to the Italian Government and was a general ship engaged in the common carriage of merchandise for hire. The Court said (2): "We think the "principles [of immunity] are applicable alike to all ships "held and used by a Government for a public purpose, and "that when, for the purpose of advancing the trade of its "people or providing revenue for its treasury, a Government "acquires, mans and operates ships in the carrying trade, "they are public ships in the same sense that war ships are. "We know of no international usage which regards the "maintenance and advancement of the economic welfare of "a people in time of peace as any less a public purpose than "the maintenance and training of a naval force." This was in 1925. The Court cited as recent authorities *Young v. Scotia* (3); *The Jassy* (4); *The Gagara* (5); *The Porto Alexandre* (6); and *The Jupiter*. (7) This judgment seems to represent the impact of modern ideas on the doctrines of *The Parlement Belge* (8), but I cannot regard it as other than representing logical evolution. The decision of the United States Court agrees with that of the Court of Appeal in *The Porto Alexandre* (6), where the ship was one which had been requisitioned by the Portuguese Government and was being employed by them in the carriage for reward of ordinary commercial cargoes. The Court of Appeal held that the

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(1) (1925) 271 U. S. 562.

(2) Ibid. 574.

(3) [1903] A. C. 501.

(4) [1906] P. 270.

(5) [1919] P. 95.

(6) [1920] P. 30.

(7) [1924] P. 236.

(8) 5 P. D. 197.

H. L. (E.) case came within the principle of *The Parlement Belge*. (1)
 19 8 Warrington L.J. referred to *Briggs v. Light Boats* (2), where
 COMPANIA immunity was granted in respect of a Government lightship,
 NAVIERA and quoted the words of the Court of Appeal in *The Parlement*
 VASCONGADO *Belge* (1) with reference to that case: "The ground of that
 v. S.S. "judgment is that the public property of a Government in
 CRISTINA. "use for public purposes is beyond the jurisdiction of the
 Lord Wright. "Courts of either its own or any other State, and that ships
 "of war are beyond such jurisdiction, not because they are
 "ships of war, but because they are public property," the
 reason being "that the exercise of such jurisdiction is
 "inconsistent with the independence of the sovereign authority
 "of the State." In view of what I regard as the nature
 and purpose of the possession held by the respondent of the
Cristina, it is not necessary to express a final opinion on the
 question; but as at present advised I am of opinion that
 these decisions of the United States Supreme Court and of the
 Court of Appeal correctly state the English law on this point.

▲ This modern development of the immunity of public ships
 has not escaped severe, and, in my opinion, justifiable criticism
 on practical grounds of policy, at least as applied in times
 of peace. The result that follows is that Governments may
 use vessels for trading purposes, in competition with private
 ship-owners, and escape liability for damage, and salvage
 claims. Various international conventions have discussed this
 problem and have culminated in the International Convention
 for the Unification of Certain Rules concerning the Immunity
 of State-owned ships, of April 10, 1926. The general purport
 of the Convention was to provide that ships owned or
 operated by States were to be subject to the same rules of
 liability as privately owned vessels; ships of war, State-
 owned yachts, and various other vessels owned or operated
 by a State on Government and non-commercial service were
 excepted. There was power for a State to suspend the
 operation of the Convention in time of war. Great Britain,
 along with the majority of modern States, signed the Con-
 vention, but has not yet ratified it or enacted any legislation

(1) 5 P. D. 197.

(2) (1865) 93 Mass. 157.

to bring it into effect in this country. But even if the provisions of the Convention were made law here, it is not clear that it would affect the position in the present case, because its effect is apparently limited to claims in respect of the operation of such ships or in respect of the carriage of cargoes in them. Thus it would affect claims in rem for collision damage such as the claim in *The Parlement Belge* (1) or for salvage as in *The Broadmayne* (2) and *The Porto Alexandre* (3) or for cargo damage as in *The Pesaro* (4), but it may be, not claims for possession such as that in the present case or *The Gagara* (5) or *The Jupiter*. (6)

I may add that in the present case it is in my opinion sufficiently shown by the evidence before the Court that the Spanish Government had actually requisitioned, and taken possession and control of, the *Cristina*. That is all that is needed to justify the claim to immunity on the ground of "property." The question how far a mere claim or assertion by that Government would be conclusive on the Court, does not arise here.

For the reasons which I have stated, the decision of Bucknill J. and of the Court of Appeal was in my judgment on the materials of fact upon which the Court must act a decision which flowed inevitably from the application of the principles of international law as recognized by the Courts of this country. In my judgment the appeal must fail.

LORD MAUGHAM. My Lords, the claim of the respondents, who are the Government of the Spanish Republic, and who entered a conditional appearance to the writ in rem, is based upon their immunity as an independent sovereign State. The facts are fully stated in the opinion of my noble and learned friend Lord Wright and it is unnecessary to repeat them at length. The appellants, the plaintiffs in the action, were at all material times and still are the sole owners of the *Cristina*. While it remained in their hands it was a private

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(1) 5 P. D. 297.

(2) [1916] P. 64.

(3) [1920] P. 30.

(4) 271 U. S. 562.

(5) [1919] P. 95.

(6) [1924] P. 236.

H. L. (E.) vessel registered at the port of Bilbao. A decree was made
 1938 in Spain on June 28, 1937, requisitioning all vessels registered
 COMPANIA in the port of Bilbao. The *Cristina* at that date was not
 NAVIERA within the territorial jurisdiction of Spain. She arrived at
 VASCONGADO the port of Cardiff on July 8. On July 14 the respondents,
 v. S.S. by their agents, and, it should be mentioned, without a
 CRISTINA. breach of the peace, took possession of the vessel. For the
 Lord Maugham. reasons given by your Lordships I accept the view that since
 July 14 the respondents, by their agent, have been in de facto
 possession of the ship. The writ was dated July 22. According to a not unusual form the defendants were "the
 "steamship or vessel *Cristina* and all persons claiming an
 "interest therein." The indorsement on the writ was a claim
 by the plaintiffs as sole owners of the ship "to have possession
 "adjudged to them" of the same. There was an arrest of
 the vessel in due course. The respondents entered a con-
 ditional appearance on July 27 and moved to set aside the
 writ and arrest for the following reasons: "That the steam-
 "ship *Cristina* was at the time the writ in this action was
 "issued the property of the Government of Spain a recognised
 "foreign independent State and that the said State declines
 "to sanction the institution of these proceedings in this Court.
 "That at the time of the issue of the writ in this action the
 "steamship *Cristina* was in the possession of the Spanish
 "Government by its duly authorised agent. That at the
 "time of the issue of the writ in this action the Spanish
 "Republican Government had a right to the possession of
 "the steamship *Cristina*. That this action impleads a foreign
 "sovereign State namely the Government of Spain."

The first reason has been abandoned. The respondents
 relied on the circumstance that by a decree of June 28, 1937,
 they had purported to requisition all vessels registered in
 the port of Bilbao (including the *Cristina*) and by reason
 thereof they claimed that they were entitled to possession of
 the *Cristina* and that they were therefore impleaded by the
 proceedings. It was alleged that the Spanish Consul at
 Cardiff had requisitioned the *Cristina* in pursuance of this
 decree and that the Spanish Government were in fact in

possession of her through a new master appointed by the said Spanish Consul. H. L. (E.)

Bucknill J. and the Court of Appeal held themselves bound by authority to decide that the Court must decline jurisdiction on the ground that a foreign sovereign State, namely, the Republic of Spain, was asserting a possessory interest in the *Cristina* and objected to the jurisdiction of the Court. Hence the present appeal. If it were successful, the result would be that our Courts would have to determine the legal effect in this country of the decree of June 28, 1937, as regards a ship under the Spanish flag which was not at that date within Spanish territorial jurisdiction. This question has not been argued and I shall abstain from expressing any opinion on it. But it seems to me that the claim by the Spanish Government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions in rem against vessels belonging to a foreign Government and employed in the ordinary operations of commerce. For my part I think such a claim ought to be scrutinized with the greatest care. In these days and in the present state of the world, diplomatic representations made to a good many States afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign Government. Moreover the persons entrusted with the making of diplomatic representations cannot try an action. If a foreign Government ship has been involved in a collision at sea due, as alleged, to the negligence of her captain and crew, the foreign Government has only to dispute liability to render further diplomatic correspondence a waste of time.

My Lords, it is not in doubt that an action in personam against a foreign Government will not be entertained in our Courts unless that Government submits to the jurisdiction. The rule was founded on the independence and dignity of the foreign Government or sovereign, or, to use the language of the future Lord Esher, delivering judgment in the great case

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H. L. (E.) of *The Parlement Belge* (1): "the real principle on which
 1938 "the exemption of every sovereign from the jurisdiction of
 COMPANIA "every Court has been deduced is that the exercise of such
 NAVIERA "jurisdiction would be incompatible with his regal dignity—
 VASCONGADO "that is to say, with his absolute independence of every
 v. "superior authority." This immunity, be it noted, has been
 S.S. admitted in all civilized countries on similar principles and
 CRISTINA. with nearly the same limits. It had been by implication
 Lord Maugham. admitted in this country by the statute 7 Anne, c. 12, passed
 in consequence of the taking of the Russian Ambassador
 from his coach and his imprisonment under the old law by
 a private suitor. The statute has always been regarded as
 merely declaratory of the common law. The settled practice
 of the Court to take judicial notice of the status of any foreign
 Government (and it may be added of its ambassador) was
 finally established in this House in the case of *Duff Development*
Co. v. Government of Kelantan. (2) The present Government
 of the Republic of Spain has been recognized as being an
 independent sovereign State.

The immunity of a foreign Government and its ambassador
 as regards property does not stand on the same footing. The
 statute of Anne protects the goods and chattels of "the
 "ambassador or other public minister . . . received as such
 ". . . or the domestic or domestic servant of any such
 "ambassador or other public minister." It is clear, I think,
 that the property in the goods and chattels would have to be
 established if necessary in our Courts before the immunity
 could be claimed. The ambassador could not be sued in
 trover or detinue; but if the property were not in his posses-
 sion and he had to bring an action to recover it I am of
 opinion that he would have to prove in the usual way that
 the goods were his property. Speaking for myself I think
 the position of a foreign Government is the same. There is,
 I think, neither principle nor any authority binding this
 House to support the view that the mere claim by a
 Government or an ambassador or by one of his servants
 would be sufficient to bar the jurisdiction of the Court, except

(1) 5 P. D. 197, 207.

(2) [1924] A. C. 797.

in such cases as ships of war or other notoriously public vessels or other public property belonging to the State. Professor Dicey has been relied on in favour of another view ; but his proposition, founded on existing authorities, was that "an action or proceeding against the property " of a foreign sovereign or an ambassador or his suite was for the purpose of the general rule " an action or proceeding against such "person " (Dicey, Chapter IV., Rule 52). He did not (as he showed in the notes to the rule) mean by this that an action against property *claimed* by such a person is beyond the jurisdiction of our Courts. An independent sovereign sued for breach of promise of marriage in our Courts can indeed claim to be outside of our jurisdiction ; but there is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's rule he would in my opinion be bound to prove his title.

The result so far, in my opinion, is that whilst in this country no action can be brought against a foreign Government or its accredited representative or persons who may be described as belonging to his suite, still, if the foreign Government (I need not further mention the other persons with a right to immunity) wishes to recover property in the hands of some third party, an action must be brought in the usual way and there must therefore be a submission to the jurisdiction up to the judgment. Whether the Government has by that submission submitted to execution for costs under the judgment on its property in this country is not yet settled : *Duff Development Co. v. Government of Kelantan*. (1) If the foreign Government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property.

(1) [1924] A. C. 797, 810, 819, 822, 830.

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H. L. (E.) I now approach one of the main questions involved in this
 1938 appeal: What is the position as regards an action in rem in
 COMPANIA relation to a ship lying in a British port or in British waters
 NAVIERA which at the date of the writ happens to be in the possession
 VASCONGADO of a foreign Government? In the present case two additional
 v. facts should be remembered: first, that the *Cristina*, before
 S.S. seizure on behalf of the Spanish Government, was an ordinary
 CRISTINA. steamship employed in commerce, and, secondly, that she
 Lord Maugham. was registered at Bilbao and sailed under the Spanish flag.

The leading authority in this country is the above mentioned case of *The Parlement Belge* (1) decided in the year 1880 by James, Baggallay and Brett L.JJ. overruling Sir R. Phillimore. It related to a Belgian steam-packet plying between Dover and Ostend belonging to the Belgian Government, manned by commissioned officers and employed to carry the mails as well as passengers and cargo. The trial judge, Sir Robert Phillimore, had decided that the action would lie because the ship was employed in commerce. In the Court of Appeal it was not in dispute that ships of war belonging to a foreign Government are exempt from our jurisdiction, and the elaborate judgment delivered by Brett L.J. was devoted to a consideration of the principles on which immunity could properly be based in order to determine whether public ships could claim the same immunity. As I read the judgment, which largely followed the reasoning of a remarkable judgment by Marshall C.J. in the Supreme Court of U.S.A. in *The Exchange* (2) two things have to be established to found the immunity, first, that to permit the action to proceed would be incompatible with the royal dignity of the foreign sovereign or Government, and secondly, that the immunity was one universally recognized in foreign countries. I would myself prefer to say "almost universally" recognized, for a few exceptions would not, I think, affect the matter; but I hold a strong opinion that the Court of Appeal was right in insisting as a condition of immunity on the adherence of other foreign Governments to the same rule as to immunity. In relation to such a rule as the one now under consideration,

(1) 5 P. D. 197.

(2) 7 Cranch, 116.

the word "comity," whatever may be its defects in regard to other rules of private international law, has a very powerful significance. Neither justice nor convenience requires that a particular State should decline to grant justice to its own nationals who have been injured by ordinary commercial vessels belonging to foreign Governments, if those Governments are not willing to extend a similar immunity to the similar vessels of the first State. Nor can anything much more absurd be imagined than that, for example, England should decline to give legal redress against a Spanish trading ship belonging to that Government while such an action would be allowed to proceed if the ship were found in port at Genoa, or indeed, for all we know, at Valencia.

Having thus laid down the principles, the judgment proceeds to deal with the question whether the *Parlement Belge* was within them; and the conclusion was in these words (1): "The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity." My Lords, I cannot myself doubt that, if the *Parlement Belge* had been used solely for trading purposes, the decision would have been the other way. Almost every line of the judgment would have been otiose if the view of the Court had been that all ships belonging to a foreign Government even if used purely for commerce were entitled to immunity, and the same is true as regards the judgment of the Supreme Court of the U.S.A. I must admit that some judges have taken another view; and the decision of the Court of Appeal in *The Porto Alexandre* (2) is a clear decision in a sense opposite to the opinion I have expressed. After much consideration I can only express my own conclusion. The judgments in *The Porto Alexandre* (2) seem to me to have omitted any consideration of what I deem to be a vital point—namely, the fact that other countries while they admit the immunity as regards ships of war and other

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(1) 5 P. D. 220.

(2) [1920] P. 20.

H. L. (E.) public ships have not been at all agreed that the same
 1938 immunity ought to be granted to ships and cargoes engaged
 COMPANIA in ordinary trading voyages.

NAVIERA It is objected that an action in rem is one in which the
 VASCONGADO foreign Government, if in possession of the ship or if it has an
 v. interest in the ship, is impleaded. That I think in a sense
 S.S. is true; but I do not think many competent jurists are of
 CRISTINA. opinion that in such a case anything more is sought, or at
 Lord Maugham. any rate can be obtained, than a remedy against the res.
 When Sir Robert Phillimore, equally distinguished as a
 judge in maritime and in international law, decided in *The*
Parlement Belge (1) (contrary to his first opinion) that the
 proceeding in rem should proceed, he was not deciding that
 a personal remedy could be enforced against the King of
 Belgium. For my part I can see no sufficient reason for
 not following in the case of a State-owned vessel, being neither
 a ship of war nor in any true sense a vessel publicis usibus
 destinata, the decision of Sir Robert Phillimore. The effect
 would be that these State-owned ships would be treated as
 exceptions to the general rule to this extent, that proceedings
 against the ships themselves might be brought and prosecuted
 to a conclusion. Other exceptions are to be found in cases
 where proceedings are brought and continued for adminis-
 tration of a trust, or an estate, or for the winding-up of a
 company, even though a foreign Government is interested:
Larivière v. Morgan (2); *In re Russian Bank for Foreign*
Trade. (3) Moreover no Court has yet held that a foreign
 Government can object to an action against a company in
 which it owns a number of shares.

I hesitate to take the view that a requisitioning decree
 relating to all vessels registered in an important port, whether
 large or small, whether built for pleasure or profit, is itself
 sufficient evidence of an intention to devote the vessels to
 public uses. On the other hand, there are special circum-
 stances in the present case. The Government of Spain is

(1) 4 P. D. 129.

(2) (1872) L. R. 7 Ch. 550; (1875) L. R. 7 H. L. 423, 430.

(3) [1933] 1 Ch. 745, 769.

engaged in civil war and is entitled to take exceptional and drastic measures to defend itself. The ships mentioned in the requisitioning decree are Spanish ships. There may be public uses for any of such ships, e.g., in carrying stores, munitions, men, orders and the like for the purposes of defence or attack. On the whole I think the circumstances of the case justify the inference that the *Cristina* is intended to be used for some of such purposes, and is therefore brought within the description *publicis usibus destinata*. She is, as already stated, in the possession of the Spanish Government. On these grounds I think she is entitled to the immunity claimed, and this is sufficient to dispose of the appeal.

My Lords, I have indicated my unwillingness to follow what I must admit to be the recent current of authority in our Courts as regards State-owned trading ships. In what follows I shall merely be indicating the opinion I have formed—one which I believe is shared by many judges and by nearly all persons engaged in maritime pursuits—that it is high time steps were taken to put an end to a state of things which in addition to being anomalous is most unjust to our own nationals.

Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of

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H. L. (E.) salvage in respect of services rendered, perhaps at great risk, by the vessel of another country? Is there justice or equity, or for that matter is international comity being followed, in permitting a foreign Government, while insisting on its own right of indemnity, to bring actions in rem or in personam against our own nationals?

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My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our Courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign Governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by business men, and with practical unanimity they are of opinion that, if Governments or corporations formed by them choose to navigate and trade as ship-owners, they ought to submit to the same legal remedies and actions as any other shipowner. This was the effect of the various resolutions of the Conference of London of 1922, of the Conference of Gothenburg of 1923 and of the Genoa Conference of 1925. Three Conferences not being deemed sufficient, there was yet another in Brussels in the year 1926. It was attended by Great Britain, France, Germany, Italy, Spain, Holland, Belgium, Poland, Japan and a number of other countries. The United States explained their absence by the statement that they had already given effect to the wish for uniformity in the laws relating to State-owned ships by the Public Vessels Act, 1925 (1925, c. 428). The Brussels Conference was unanimously in favour of the view that in times of peace there should be no immunity as regards State-owned ships engaged in commerce; and the resolution was ratified by Germany, Italy, Holland, Belgium, Esthonia, Poland, Brazil and other countries, but not so far by Great Britain. (Oppenheim, *International Law*, 5th ed., vol. i., p. 670.)

It must not be supposed that all the countries attending the Conferences I have referred to were bound by their municipal laws to grant the immunity in question. There is no doubt that the practice as to the immunity of State-owned merchant ships has been and still is far from uniform (Oppenheim,

vol. i., p. 669). France and Belgium, for example, grant only a limited immunity, and Italy no immunity at all. I have not been able to ascertain the position taken up by Spain. The Soviet Republic has apparently adopted the admirable practice of owning its merchant ships through limited companies, and does not claim—even if it could, which for my part I should doubt—any immunity whatever in relation to such ships.

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I should add that it appears that the United States Courts still adhere to the practice of granting immunity to foreign State-owned ships engaged in commerce. The statute above referred to (1925, c. 428) permits (s. 1) actions to be brought for damages “caused by a public vessel of the United States” and for compensation for towage and salvage services “including contract salvage rendered to a public vessel of the “United States.” This, it will be noted, does not refer in terms to State-owned vessels engaged in trade, but in other respects it extends much further than many countries would be prepared to go, and s. 5 of the statute gives a right of action under the Act to nationals of a foreign Government only if it is proved that such Government “under similar “circumstances allows nationals of the United States to sue “in its Courts.” It would seem that the Legislature of the United States, like that of all or nearly all other civilized countries, is disposed to the view that the immunity of State-owned private vessels ought not to be continued.

A number of other points were ably argued for the appellants, and I have not dealt with them only because I am unable usefully to add anything on those points to what has fallen from my noble and learned friend Lord Wright. I concur in the proposed motion.

Appeal dismissed.

Solicitors for appellants : *Ince, Roscoe, Wilson & Glover.*

Solicitors for respondents : *Petch & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*	INLAND REVENUE COMMISSIONERS	. APPELLANTS ;
1938	AND	
Feb. 7, 8,	NATIONAL MORTGAGE AND AGENCY	} RESPONDENTS.
10, 11 ;	COMPANY OF NEW ZEALAND.	
March 17.		

Revenue—Income tax—Business carried on in New Zealand by company—Company controlled in the United Kingdom—Relief from double taxation—Sum on which relief granted—Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 27, sub-s. 1.

Where in any year income tax has been paid in the United Kingdom and in a Dominion in respect of the profits of a business carried on by a company in the Dominion, then for the purpose of computing the amount in respect of which relief from United Kingdom income tax is granted by s. 27, sub-s. 1, of the Finance Act, 1920, the amounts of the assessable income in respect of these profits in the two countries must be ascertained and relief be granted on the whole or such part of the assessable income in the United Kingdom as is equal in amount to the assessable income in the Dominion without regard to difference of allowances or deductions for expenses made in the two countries in arriving at the assessable income.

Where a sum paid by the company in respect of debenture interest is, under the law of the Dominion, excluded from the assessable income, but the company pays the income tax in respect of it as agent for the debenture-holders, relief must be granted on the amount of the debenture interest so paid without regard to how the tax on that interest is ultimately borne.

Inland Revenue Commissioners v. Dalgety & Co. [1930] A. C. 527 and *Assam Railways and Trading Co. v. Inland Revenue Commissioners* [1935] A. C. 445 discussed.

Decision of Court of Appeal [1937] 1 K. B. 685 affirmed.

APPEAL from a decision of the Court of Appeal. (1)

At a meeting of the Special Commissioners held on December 8, 1931, the National Mortgage and Agency Company of New Zealand (hereinafter called "the company") claimed relief in respect of New Zealand income tax under the provisions of s. 27 of the Finance Act, 1920, for the years

(1) [1937] 1 K. B. 685.

* *Present* : LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

ended April 5, 1925, to April 5, 1931. The claims for the two years to April 5, 1929, were alone dealt with, it being agreed that the decision upon the claims for these years should be applied to the other years.

The company was incorporated in England under the Companies Acts with an authorized capital of 1,500,000*l.* in 125,000 ordinary shares of 10*l.* each and 250,000 preference shares of 1*l.* each. The company had from time to time issued debentures at varying rates of interest, secured upon the uncalled capital of the company. The amount of the debentures outstanding on September 30, 1927, was 782,275*l.* 9*s.* 9*d.*

The company, which was controlled in the United Kingdom, was a finance company, and its business mainly consisted in lending money in New Zealand on mortgages and short loans, generally secured on farm chattels and on land. By far the greater part of the company's income arose in New Zealand, chiefly from the interest on these loans.

The company owned some real property in New Zealand, being premises occupied by it for the purposes of its business. It also had an investment in New Zealand War Loan, investments in ordinary and preference shares in New Zealand companies, and investments in the United Kingdom, the income from which was subject to deduction of United Kingdom income tax at the source. The company was assessed to income tax in the United Kingdom under Sch. D, and in computing the amount of the liability under Case I. of that Schedule the debenture interest paid by the company was not allowed as a deduction from the profits, and was consequently included in the assessment to the United Kingdom tax.

Income tax was imposed in New Zealand by the Land and Income Tax Act, 1923, of which the following were the material sections :—

Sect. 2 : “ ‘ Assessable income ’ means income of “any kind which is not exempted from income tax otherwise “than by way of a special exemption expressly authorised as “such by this Act : ‘ Taxable income ’ means the “residue of assessable income after deducting the amount of

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“the special exemptions to which the taxpayer is entitled.”

Sect. 72: “(1.) Subject to the provisions of this Act, “there shall be levied and paid for the use of His Majesty in “and for the year commencing on the first day of April, 1924, “and in and for each year thereafter a tax herein referred to “as income tax.

“(2.) Subject to the provisions of this Act, such tax shall “be payable by every person on all income derived by him “during the year preceding the year in and for which the tax “is payable.

“(3.) The year in which income is so derived is in this Act “referred to as ‘the income year’ and the year in and for “which income tax is payable is in this Act referred to as “‘the year of assessment.’ ”

Sect. 73: “(1.) Income tax shall be assessed and levied “on the taxable income of every taxpayer at such rate or “rates as may be fixed from time to time by Acts to be passed “for that purpose.

“(2.) The Act by which the rate of income tax is so fixed “for any year is in this Act referred to as ‘the annual taxing “‘Act.’ ”

Sect. 74: “(1.) From the yearly assessable income of “every person other than a company or an absentee, there “shall for the purpose of assessing income tax on that income “be deducted by way of special exemption the sum of 300*l.* “diminished at the rate of 1*l.* for every pound of the excess of “that income over 600*l.*, ...

“(2.) ‘Absentee’ means, in this Part of this Act, a person “whose home has not been in New Zealand during any part “of the income year.”

Sect. 78: “The following income shall be exempt from “taxation:—

“(g) Dividends and other profits derived from shares or “other rights of membership in companies, other than “companies which are exempt from income tax:

“(h) Income derived by a person who is not (within the “meaning of this Part of this Act) resident in New Zealand, “from stock or debentures which have been issued by the

"Government of New Zealand, or by any local or public
 "authority, or by the Public Trustee acting as the agent of
 "a land settlement association under the Land Settlement
 "Finance Act, 1909, and the interest on which is payable out
 "of New Zealand :

"(i) Income derived by the trustees of a superannuation
 "fund :

"(m) Income expressly exempted from income tax by any
 "other Acts to the extent of the exemption so provided."

Sect. 79 : "(1.) Without in any way limiting the meaning
 "of the term, the assessable income of any person shall for
 "the purposes of this Act be deemed to include, save so far as
 "express provision is made in this Act to the contrary, ...

"(g) All interest, dividends, annuities and pensions"

Sect. 80 : "(1.) In calculating the assessable income
 "derived by any person from any source no deduction shall
 "be made in respect of any of the following sums or
 "matters :

"(h) Interest, except so far as the Commissioner is satisfied
 "that it is payable on capital employed in the production of
 "the assessable income."

Sect. 83 : "(1.) When any land in which a taxpayer owns
 "an interest, or any portion of such land, has throughout the
 "income year or any portion thereof been actually used by
 "the taxpayer exclusively for the purposes of his business or
 "for the purpose of deriving rent, royalties, or other profits
 "therefrom, he shall be entitled by way of special exemption
 "to deduct from the assessable income derived by him during
 "the income year, so far as derived from such use of the land
 "a sum computed in respect of the period of such use at the
 "rate of five per centum per annum on the capital value for
 "the time being of his interest in the land or in the portion
 "thereof so actually used by him, as the case may be, and
 "income tax shall be assessed and payable accordingly."

Sect. 84 : "(3.) Subject to the provisions of this Act, no
 "income which is neither derived from New Zealand nor
 "derived by a person then resident in New Zealand shall be
 "assessable for income tax."

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Sect. 99: "(2.) If the Commissioner is satisfied with
 "respect to the holder of any debenture or debentures issued
 "by any local or public authority or by any company that
 "the aggregate amount of income tax paid or payable by or
 "on behalf of the debenture-holder (including the tax paid in
 "respect of interest on debentures) exceeds the amount of tax
 "that would have been payable by him if the interest received
 "by him on those debentures had formed part of his taxable
 "income, the Commissioner shall, on application by the
 "taxpayer, pay to him the amount of the excess."

Sect. 116: "(1.) Save as otherwise provided in the next
 "succeeding section every company which has issued
 "debentures, whether charged on the property of the company
 "or not, shall for the purposes of this Act be the agent of all
 "debenture-holders, whether absentees or not, in respect of all
 "income derived by them from those debentures, and shall
 "make returns and be assessable and liable for income tax
 "on that income accordingly.

"(2.) No deduction by way of special exemption or otherwise
 "shall be allowed to the company as such agent, or to any
 "debenture-holders, in respect of the income so derived from
 "debentures.

"(3.) Income so derived by debenture-holders in companies
 "shall be assessable and chargeable with income tax separately
 "from income derived by the debenture-holders from other
 "sources, and at the rate prescribed by the annual taxing
 "Act as appropriate to income so derived.

"(4.) Income derived from debentures held by a banking
 "company shall not be liable to income tax under this section."

Sect. 130: "Where an agent pays any tax he may recover
 "the amount so paid from his principal, or may deduct the
 "amount from any money in his hands belonging or payable
 "to his principal."

Sect. 170: "Every contract, agreement or arrangement
 "made or entered into, whether before or after the coming
 "into operation of this Act, shall be absolutely void in so far
 "as, directly or indirectly, it has or purports to have the
 "purpose or effect of in any way altering the incidence of

"land tax or income tax, or relieving any person from his liability to pay such tax." H. L. (E.)

Sect. 171: "(1.) Nothing in the last preceding section shall be so construed as to render void any contract, agreement, or arrangement made or entered into by any company (whether before or after the coming into operation of this Act) to the effect that the interest on any debentures issued by that company shall be free of income tax; and all such contracts, agreements, and arrangements are hereby declared to be valid and effective in accordance with this section unless the company is expressly or implicitly prohibited, by its memorandum and articles of association from making or entering into any such contract, agreement, or arrangement.

"(2.) When any debentures issued by a company purport to be issued free of income tax the company shall be liable for the payment of the income tax payable in respect thereof, and the debenture-holders shall be entitled to receive the full amount of interest payable pursuant to the debentures."

In computing the assessable income of the company for the New Zealand tax a deduction had been allowed under s. 80, sub-s. 1 (*h*), for the interest on so much of the debenture capital as had been employed in the production of the assessable income. The amount of interest so deducted was 37,861*l.* for the year to September 30, 1926, and 34,779*l.* for the year to September 30, 1927, out of the total debenture interest paid by the company of 40,261*l.* and 39,321*l.* 11*s.* 10*d.* for those years. There were also deducted under s. 83, sub-s. 1, the sums of 9999*l.* and 9998*l.* by way of special exemption as representing 5 per cent. of the value of the land owned by the company and used by it for the purpose of the business.

The dividends from New Zealand companies, the interest on New Zealand War Loan, and certain income earned in London were excluded from the assessable income.

The computation for the year 1927/1928 resulted in a loss and no New Zealand income tax was payable direct by the company for that year in respect of its assessable income.

The computation for the year 1928/1929 showed an

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The computation of the company's profits for assessment to United Kingdom income tax differs in several other material respects, e.g., in the allowance for bad debts, from the computation for the purposes of New Zealand income tax.

The company's investments in New Zealand companies consisted almost entirely of ordinary and preference shares in a company which may be referred to as X. X was assessed to New Zealand income tax on its profits, and the dividends paid to the company were not again assessable to New Zealand income tax in the company's hands. No New Zealand tax was deducted by X from the preference dividends and the Crown contended that the company had not paid New Zealand tax in respect of these preference shares. It was admitted that the company had paid New Zealand tax on the dividends on the ordinary shares which it held in X.

The company was also assessed as agent in New Zealand for its debenture-holders for each of the two years in respect of the debenture interest applicable to New Zealand. The tax was in the first place charged on the company at full rates appropriate to the respective debenture-holders as shown by the revised notices of assessment dated August 20, 1929. The interest on the debentures being payable under a contract made in the United Kingdom, the company had no power to deduct and did not in fact deduct any New Zealand income tax therefrom, notwithstanding that it had been assessed to and had paid that tax as agent for the debenture-holders.

Computation was made on behalf of the company of the relief which it claimed to be due in respect of New Zealand income tax and computations were made on behalf of the Commissioners of Inland Revenue showing no relief to be due. The items in dispute were :—

- (1.) The debenture interest applicable to New Zealand.
- (2.) The allowance of 5 per cent. on the value of the land owned by the company and used by it for the purposes of its business.

(3.) The dividends on preference shares of X from which no New Zealand tax had been deducted. H. L. (E.)

(4.) The New Zealand War Loan interest.

The Crown admitted the claim to relief in respect of the dividends on the ordinary shares of X.

It was contended on behalf of the company :—

(1.) That the relief must be based on the amount of the income as computed for the purpose of the United Kingdom tax, and that the method by which the New Zealand assessment was computed and the deductions allowed in arriving at that assessment were immaterial.

(2.) That accordingly the fact that the debenture interest applicable to New Zealand and the allowance of 5 per cent. on the land owned by the company and used in its business were allowed as deductions in computing the New Zealand assessment should not be taken into account and the relief should be allowed on the United Kingdom figures without any deduction for these two items.

(3.) That X, having paid New Zealand income tax on the profits out of which its preference shares were paid, the company should be allowed relief on those dividends.

(4.) Alternatively (as regards the debenture interest) the company, having paid New Zealand tax thereon as agent for the debenture-holders and having been obliged to bear this tax, was entitled to relief in respect of the tax so paid.

It was contended on behalf of the Crown :—

(1.) That the company had not paid any New Zealand tax direct in respect of its assessable income.

(2.) That the New Zealand War Loan interest, the debenture interest, and the allowance of 5 per cent. on the value of the land had been specifically excluded and exempted from the subjects of taxation in New Zealand and had not borne tax in New Zealand as part of the company's profits, and that consequently no relief was due thereon.

(3.) That no New Zealand tax had been paid by the company on the preference dividends from X, and therefore no relief was due thereon.

(4.) That on the alternative contention the company was

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only assessed to tax on the debenture interest as agents for the debenture-holders and this tax was not paid by the company on its income.

The Commissioners gave the following interim decision :—

The main question in this case is on what part or parts of the income of the appellant company has New Zealand income tax been paid.

The appellant company contends that it has paid New Zealand income tax on the whole of its profits arising from its business in New Zealand, while the Crown contends that it has only paid New Zealand income tax on its profits from its business in New Zealand less the profits applied in payment of its debenture interest for which allowance has been made in calculating its business profits under s. 80, sub-s. (h), of the Land and Income Tax Act, 1923.

It was argued on behalf of the appellant company that the whole of New Zealand income was income from one source, and that in determining the part of the income on which relief is allowable regard must be had to the source from which it is derived and not to its amount.

In support of this argument reliance was placed on a dictum of Warrington L.J. in *Rolls Royce, Ltd. v. Short*. (1) It must, however, be observed that in that case the Court was only concerned with English income as a whole and Indian income as a whole, and no question arose as to whether Indian income tax had been paid on different parts of the Indian income.

It seems clear to us that when under Dominion income tax law different parts of the Dominion income are separately treated as regards the liability to Dominion income tax, we are bound to discriminate between those different parts and see whether Dominion income tax has been paid in respect of each of those parts or not.

In this case the income applied in payment of the debenture interest for which allowance has been made has been specifically excluded from the profits on which the appellant company has been assessed to New Zealand income tax, and consequently

no New Zealand income tax has been in fact paid in respect of the profits so applied under the assessments made on the appellant company in respect of its business profits.

On the other hand, the appellant company has been separately assessed as agent for its debenture-holders in respect of the debenture interest paid by it, and has paid the tax so charged at the rates appropriate to the respective debenture-holders' incomes. The appellant company has not been able to reimburse itself by deduction of this tax from its debenture-holders. In view of the specific separation of the income applied in payment of the debenture interest for which allowance has been made from the rest of the income, we are of opinion that the income so applied must be regarded as a separate part of the appellant company's income.

We hold therefore that the appellant company is entitled to relief in respect of the New Zealand income tax on the profits of its business less the profits applied in payment of debenture interest for which allowance has been made, but it is also entitled to relief in respect of the income tax which it has paid on the debenture interest at the rates appropriate to the respective incomes of the debenture-holders, such interest being treated as its income under the decision in *Inland Revenue Commissioners v. Dalgety & Co.* (1)

There are three subsidiary questions to be dealt with:—

(a) The income from New Zealand War Loan is specifically exempted from New Zealand income tax under s. 78 (h) of the Land and Income Tax Act, 1923. This is clearly a separate part of the appellant company's income, and as no New Zealand income tax has been paid in respect of it the appellant company is not entitled to any relief.

(b) Five per cent. of the capital value of the land used by the appellant company for the purposes of its business or deriving profits therefrom has been allowed as a deduction by way of special exemption in computing the assessable income of the appellant company for the purposes of the New Zealand income tax. A part of the profits equal to 5 per cent. of the capital of the land has thus been excluded from the profits

(1) [1930] 1 K. B. 1; [1930] A. C. 527; 15 Tax Cas. 216.

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(c) As regards the dividends on the preference shares which the appellant company holds in X, although New Zealand tax has been paid by X on its profits, out of which those dividends have been paid, no New Zealand income tax has been paid or suffered by the appellant company on those dividends.

The parties having been unable to come to an agreement as to the method of computation of the relief to be allowed in respect of the New Zealand income tax which the company had paid on the debenture income, the Commissioners held a further meeting on November 8, 1932, to determine this point.

Two questions emerged :—

(1.) As stated earlier in the case the company had paid New Zealand income tax on the debenture interest at varying rates appropriate to the incomes of the respective debenture-holders. Further, certain interest paid to the trustees of the Superannuation and Provident Fund had been altogether exempted from New Zealand income tax under s. 78 (i) of the Land and Income Tax Act, 1923. It was claimed on behalf of the company that the whole of the debenture interest on which the New Zealand income tax had been paid formed one part of the company's income, and that relief should be allowed at the rate arrived at by dividing the total amount of the income tax paid by the total amount of such debenture interest. It was claimed on behalf of the Crown that each item of debenture interest should be taken separately, and that relief should be allowed on each item at the rate of income tax paid on it, subject to the restriction imposed by s. 27, sub-s. 1 (b), of the Finance Act, 1920, to one-half of the appropriate rate of United Kingdom income tax.

(2.) In the year 1927/1928 the company had not made enough profit in New Zealand to pay its debenture interest. Accordingly the debenture interest was paid to the extent of 10,556*l.* out of dividends on United Kingdom investments of the company which were not subjected to New Zealand income

tax as income of the company, but New Zealand income tax had been paid by the company on the whole of the debenture interest, whether such interest was paid out of New Zealand profits or the United Kingdom dividends. It was claimed on behalf of the company that the sum of 10,556*l.* had borne income tax both in the United Kingdom and in New Zealand, and relief must be allowed thereon; and on behalf of the Crown that the sum of 10,556*l.* was not taxed in New Zealand as income, but was only taxed by reason of its application in payment of debenture interest, and no relief was due thereon.

The Commissioners held that the debenture interest as a whole formed one part of the company's income, and the rate of relief to be allowed in respect of the tax paid on the debenture interest was to be computed by dividing the total tax paid in respect of the interest by the total amount of the debenture interest, including that part which had been exempted from New Zealand income tax. They further held that the United Kingdom income which had been applied in payment of the debenture interest had suffered both United Kingdom income tax and New Zealand income tax, and that relief should be allowed thereon accordingly.

The company appealed, and there was a cross-appeal by the Crown in regard to tax on debenture interest.

Finlay J. said that it was conceded that if *Assam Railways and Trading Co. v. Inland Revenue Commissioners* (1), as decided by the Commissioners and affirmed by him, stood, the present case was correctly decided by the Commissioners in regard to the company's appeal; but it was said that that case was decided on a different ground in the Court of Appeal and in the House of Lords—namely, that if income from one source was taxed in the United Kingdom and in the Dominion, an allowance must be made against double taxation on the lesser sum. It was said that differences as to what parts of the income were brought into assessment and differences as to the methods of computation must be ignored. In his opinion the House affirmed the views of the Commissioners and accordingly that it was not open to the company to contend

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(1) [1933] 2 K. B. 576; [1935] A. C. 445.

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that all that was necessary was to look at the two amounts at which the income was assessed in the two countries and to give relief in respect of the smaller amount. The company's appeal must therefore be dismissed.

As to the cross-appeal in regard to the tax on the debenture interest the point was whether the income in respect of which the company paid tax in New Zealand as agent for the debenture-holders could be regarded as its income within the meaning of the words in s. 27: "part of his income." He thought that could not be so, although he recognized that the company had not been able to recoup itself on the special facts of the case. The fact remained that the company paid the tax only as agent and at rates appropriate not to itself but to its various principals. It could not be said to be paying tax on its own income. The result was that the Crown's cross-appeal succeeded.

The company appealed.

The Court of Appeal allowed the appeal, holding that where in any year income tax has been paid in the United Kingdom and in a Dominion in respect of the profits of a business carried on by a company in the Dominion, then for the purpose of computing the amount in respect of which relief from United Kingdom income tax is granted by s. 27, sub-s. 1, of the Finance Act, 1920, the amounts of the assessable income in respect of these profits in the two countries must be ascertained and relief be granted on the whole or such part of the assessable income in the United Kingdom as is equal in amount to the assessable income in the Dominion without regard to differences of allowances or deductions for expenses made in the two countries in arriving at the assessable income; and further, that when the sum paid by the company in respect of debenture interest is under the law of the Dominion excluded from the assessable income, but the company pays the income tax in respect of it as agent for the debenture-holders, relief must also be granted on the amount of the debenture interest so paid without regard to how the tax on the debenture interest is ultimately borne.

The Commissioners of Inland Revenue appealed to this House.

Sir Terence J. O'Connor S.-G. and *Reginald Hills* for the appellants. On the question raised as to the basis upon which the part of the company's income which is to be treated as having suffered both United Kingdom and Dominion tax should be ascertained the principles laid down by *Finlay J.* are correct and should be affirmed. Sect. 27 of the Finance Act, 1920, as explained in *Assam Railways and Trading Co. v. Inland Revenue Commissioners* (1) requires that identity as to both the source and amount of income must be established before a claim to relief from double taxation can be sustained, and such identity did not exist, or at most existed only as to 9689*l.* The sum of 34,779*l.* expended in paying the debenture interest was not part of the income of the company upon which it paid any New Zealand tax and therefore falls to be excluded from the income in respect of which relief can be claimed. The interest paid to the debenture-holders was the income of the debenture-holders, and in relation to the company does not come within the expression "his income" in s. 27, sub-s. 1, of the Finance Act, 1920. Our conception of taxable income does not permit the deduction of debenture interest: it is not on the same plane as wear and tear or cost of repairs. [*Inland Revenue Commissioners v. Dalgety & Co.* (2) was also cited.]

Latter K.C. and *Cyril King K.C.* for the respondents were only called upon as to the debenture interest point. The profits of the company's trade applied in payment of debenture interest were part of the company's profits and have been held to be so for the purposes of s. 27: see *Inland Revenue Commissioners v. Dalgety & Co.* (2) Having paid tax in New Zealand as well in the United Kingdom upon the profits of its trade in New Zealand applied in payment of debenture interest, the company is entitled to the relief claimed.

Sir Terence J. O'Connor S.-G. replied.

The House took time for consideration.

1938. March 17. LORD MAUGHAM L.C. (read by LORD

(1) [1935] A. C. 445.

(2) [1930] A. C. 527.

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H. L. (E.) ATKIN). My Lords, these appeals raise questions upon the true construction and effect of s. 27 of the Finance Act, 1920, a difficult section which has already led to arguments and differences of opinion in the Courts and has more than once come before your Lordships. There are now in fact two appeals from orders of the Court of Appeal dated March 4, 1937, allowing appeals by the respondent company (to be called here "the company") from two orders of Finlay J. dated July 31, 1935. The matters came before the learned judge as to one case by way of case stated from a decision of the Commissioners for the special purposes of the Income Tax Acts and as to the other from a decision of the said Commissioners. In the first case the learned judge reversed their decision; in the second he affirmed it. The facts have some complexity and are related to the claims of the company to relief under s. 27 in respect of the seven income tax years 1924-25 to 1930-31 inclusive. Fortunately it has been agreed that the facts with regard to the year 1928-29 can be treated as sufficiently illustrating the principles to be observed in applying the provisions of s. 27; and that agreement was observed in the King's Bench Division and in the Court of Appeal and was continued in the hearing before your Lordships.

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The company is a company incorporated in England under the Companies Act with an authorized share capital of 1,500,000*l.* of which at the material times 250,000*l.* had been issued and paid up. It has also issued in the United Kingdom debentures at varying rates of interest secured on its uncalled capital. The amount of the debentures outstanding at September 30, 1927, was 782,275*l.* 9*s.* 9*d.* and the amount of the interest paid in the year ending on that date was 39,321*l.* 11*s.* 10*d.*

The business of the company in the main consists in lending money in New Zealand on mortgages and short loans. By far the greater part of the company's income arises in New Zealand, chiefly from the interest on these loans. The company owns real property in New Zealand, being premises occupied by it for the purposes of its business. It also had during the relevant years an investment in New Zealand War Loan

(specifically exempted from New Zealand income tax), investments in ordinary and preference shares in New Zealand companies, and investments in the United Kingdom the income from which was taxed at source in the United Kingdom. No question arises on this appeal as to the income from the company's investments.

The company, being controlled in England, was taxed to United Kingdom income tax on the whole of its profits whether arising from its trade in New Zealand or otherwise under the Income Tax Act, 1918. It was also taxed to New Zealand income tax in New Zealand in respect of its profits arising in New Zealand. Both in the United Kingdom and in New Zealand the tax is computed by reference to the profits of the year preceding the year of assessment, for example, for the assessment year 1928-29 by reference to the company's year ending September 30, 1927.

The section of the Finance Act, 1920, so far as material and as amended by s. 46 of the Finance Act, 1927, and the Fifth Schedule, Part II., 2 (i.), runs as follows: "27.—(1.) If any "person who has paid, by deduction or otherwise, or is "liable to pay, United Kingdom income tax for any year of "assessment on any part of his income, proves to the satisfaction "of the Special Commissioners that he has paid Dominion "income tax for that year in respect of the same part of his "income, he shall be entitled to relief from United Kingdom "income tax paid or payable by him on that part of his income "at a rate thereon to be determined as follows:—

"(a) If the Dominion rate of tax does not exceed one "half of the appropriate rate of United Kingdom income "tax, the rate at which relief is to be given shall be the "Dominion rate of tax ;

"(b) In any other case the rate at which relief is to be given "shall be one half of the appropriate rate of United Kingdom "income tax."

It is clear that the section relates to the statutory incomes in the United Kingdom and in the Dominion, that is, incomes ascertained for a particular year of assessment according to the systems and rules in force in the two countries. The relief

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afforded is in respect of double taxation, and is then given as a relief from United Kingdom income tax. It is necessary to prove (1.) payment or liability to pay United Kingdom income tax for a year of assessment on a part of the payer's income, and (2.) payment of Dominion income tax for that year in respect of the same part of his income. This involves the ascertaining of those "parts" in the two countries, by excluding from the statutory incomes in the two countries items which do not satisfy the conditions according to the true construction of the section. For brevity I shall call the part in the United Kingdom in regard to which the taxpayer can prove that he has paid Dominion tax in respect of the same part "the United Kingdom comparative income," and I shall call the similar part in respect of which he has paid New Zealand tax "the New Zealand comparative income." The problems to be solved are the amounts of these two comparative incomes. As will appear later it is the smaller of the two in respect of which relief is afforded by the section. For the year 1928-29 the profits of the trade of the company computed for assessment to United Kingdom tax under Case I. of Sch. D was (as adjusted) 70,017*l.* This sum included certain items of income which did not enter into the profits of the trade carried on in New Zealand. (The details will be stated later). It was admitted before your Lordships on behalf of the company that these items, which amounted altogether to 25,549*l.*, must be deducted from the 70,017*l.*, leaving (if nothing more ought to be deducted) the sum of 44,468*l.* as the United Kingdom comparative income.

In considering the figure of 70,017*l.* for the purposes of the questions that arise on this appeal it must be remembered that according to the provisions of the Income Tax Act, 1918, the debenture interest paid by the company in Great Britain, amounting to the sum of 39,321*l.* for the year in question, was not deducted in arriving at the amount of the assessment, though the company of course has a right to deduct the tax on payment of the interest to the debenture-holders.

Income tax is imposed in New Zealand by the Land and Income Tax Act, 1923. Your Lordships have thought it

necessary to consider all the provisions of this Act, but for the purposes of making this opinion intelligible it will be sufficient to set out the relevant parts of the following sections:—

“73.—(1.) Income tax shall be assessed and levied on the taxable income of every taxpayer at such rate or rates as may be fixed from time to time by Acts to be passed for that purpose.

“74.—(2.) ‘Absentee’ means, in this Part (sections 72 to 110) of this Act, a person whose home has not been in New Zealand during any part of the income year.

“78.—The following incomes shall be exempt from taxation:—

“(g) Dividends and other profits derived from shares or other rights of membership in companies, other than companies which are exempt from income tax:

“79.—(1.) Without in any way limiting the meaning of the term, the assessable income of any person shall for the purposes of this Act be deemed to include, save so far as express provision is made in this Act to the contrary—

“(g) All interest, dividends, annuities and pensions:

“80.—(1.) In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters:—

“(h) Interest, except so far as the Commissioner is satisfied that it is payable on capital employed in the production of the assessable income.

“83.—(1.) When any land in which a taxpayer owns an interest, or any portion of such land, has throughout the income year or any portion thereof been actually used by the taxpayer exclusively for the purposes of his business or for the purpose of deriving rent, royalties, or other profits therefrom,

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"he shall be entitled, by way of special exemption, to
 "deduct from the assessable income derived by him during
 "the income year, so far as derived from such use of the land,
 "a sum computed in respect of the period of such use at the
 "rate of five per centum per annum on the capital value for
 "the time being of his interest in the land or in the portion
 "thereof so actually used by him, as the case may be, and
 "income tax shall be assessed and payable accordingly.

"84.—(2.) Subject to the provisions of this Act, all income
 "derived from New Zealand shall be assessable for income tax,
 "whether the person deriving that income is resident in New
 "Zealand or elsewhere.

"(3.) Subject to the provisions of this Act, no income which
 "is neither derived from New Zealand nor derived by a person
 "then resident in New Zealand shall be assessable for income
 "tax.

"99.—(2.) If the Commissioner is satisfied with respect to
 "the holder of any debenture or debentures issued by any local
 "or public authority or by any company that the aggregate
 "amount of income tax paid or payable by or on behalf of the
 "debenture-holder (including the tax paid in respect of interest
 "on debentures) exceeds the amount of tax that would have
 "been payable by him if the interest received by him on those
 "debentures had formed part of his taxable income, the
 "Commissioners shall, on application by the taxpayer, pay to
 "him the amount of the excess.

"III.—In this part of this Act (sections III to 132) the term
 "'Absentee' means—

"(a) Any person (other than a company) who is for
 "the time being out of New Zealand.

"116.—(1.) Save as otherwise provided in the next succeed-
 "ing section, every company which has issued debentures,
 "whether charged on the property of the company or not,
 "shall for the purposes of this Act be the agent of all debenture-
 "holders, whether absentees or not, in respect of all income

"derived by them from those debentures, and shall make
 "returns, and be assessable and liable for income tax on that
 "income accordingly.

"(2.) No deduction by way of special exemption or other-
 "wise shall be allowed to the company as such agent, or to
 "any debenture-holders, in respect of the income so derived
 "from debentures.

"(3.) Income so derived by debenture-holders in companies
 "shall be assessable and chargeable with income tax separately
 "from income derived by the debenture-holders from other
 "sources, and at the rate prescribed by the annual taxing Act
 "as appropriate to income so derived.

"(4.) Income derived from debentures held by a banking
 "company shall not be liable to income tax under this section.

"126.—(1.) Every agent shall be personally liable for the
 "tax on land or income in respect of which he is an agent.

"127.—Every agent shall make returns of the land and
 "income in respect of which he is an agent, and shall be
 "assessed thereon in the same manner as if he was the principal,
 "save that he shall be entitled to no special exemption other
 "than such exemption (if any) as his principal may be entitled
 "to.

"130.—When an agent pays any tax he may recover the
 "amount so paid from his principal, or may deduct the amount
 "from any moneys in his hands belonging or payable to his
 "principal."

In computing the assessable income of the company in New Zealand a deduction had been allowed (s. 80 (h)) for the interest on so much of the debenture capital as had been employed in the production of the assessable income—namely, the sum of 34,779*l.* A special exemption was allowed under s. 83 amounting to 9998*l.* The dividends from New Zealand companies, the interest on New Zealand War Loan, and certain income earned in the United Kingdom were also excluded.

The company was accordingly assessed to tax in New

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Zealand in respect of its business and assets there in the sum of 26,592*l.*, after making all the various deductions and exemptions above referred to. It was, however, also bound under s. 116 to make returns and it was made liable to pay and has paid income tax "in respect of all income derived by" the debenture-holders from all the debentures it had issued. This is expressly stated in s. 116 (*supra*) to be done "as agent of" "all debenture-holders, whether absentees or not." These persons, however, hold debentures registered in Great Britain, which in fact do not confer a charge on any property in New Zealand. It is not in dispute that the holders, or most of them, reside in Great Britain, and they could not therefore be directly liable to pay income tax under a New Zealand statute which is necessarily subject to well known territorial limitations. Moreover, for another reason the company is unable to rely on s. 130 of the New Zealand Act. The interest on the debentures is payable under a contract made in the United Kingdom and to be performed here, and the company, as is indeed admitted, will be unable to recover from its debenture-holders the tax which it has paid in respect of the income due on the debentures: see para. 9 of the case stated, and *Indian and General Investment Trust v. Borax Consolidated*. (1) The question then arises, is the New Zealand comparative income 26,592*l.*, or ought it to include the debenture interest assessed and paid by the company under s. 116, which appears to be (as adjusted) the sum of 33,609*l.*, making the total sum of 60,201*l.*?

The United Kingdom statutory income as already stated was 70,017*l.* The items which it is now admitted must be deducted were in respect of: (1.) Dividends on preference shares in a New Zealand company called in the case for convenience "X" which the respondent company received and from which no New Zealand tax was deducted and which under the New Zealand Act was excluded from assessable income of the company (1500*l.*). (2.) Interest on New Zealand War Loan which is specifically exempted from tax under the New Zealand Act (860*l.*). (3.) Dividends on ordinary shares

(1) [1920] 1 K. B. 539.

in the company "X" (19,758*l.*). (4.) Profits earned in the United Kingdom (3431*l.*). H. L. (E.)

These items, which amount to 25,549*l.*, were deductible as not having been taxed in New Zealand, so that the taxpayer has not "paid Dominion income tax for that year in respect "of " those items. This, as above stated, would leave the sum of 44,468*l.* as the United Kingdom comparative income. The Crown, however, contends on the grounds to be next stated that the sum of 9998*l.*, the 5 per cent. unimproved value of the land specially exempt under s. 83 of the New Zealand Act, should also be deducted from the 44,468*l.*, thus reducing the United Kingdom comparative income to 34,470*l.* The question here is whether that contention is correct.

My Lords, two points of principle have been argued in this House on behalf of the Crown: First, it is contended that it is necessary for the purposes of s. 27 to investigate the component elements of the income as computed and assessed under the taxing Act of each country and to eliminate elements not common to each system of taxation, i.e., elements which not being included in the income as computed for the tax of each country had not been the subject-matter of taxation by the law of each country. By this contention it is sought to deduct the sum of 9998*l.* from the United Kingdom comparative income. Secondly, it is contended that the interest paid to the debenture-holders was their income for which the company has been taxed as agent for those debenture-holders and that the income in question does not fall within the expression "his income" in s. 27, sub-s. 1. If this contention were to prevail the (adjusted) sum of 33,609*l.* (paid in respect of debenture interest) could not be treated as part of the income of the company in New Zealand in respect of which it has paid income tax, and therefore could not be added for the purposes of s. 27 to the company's statutory income in New Zealand (26,592*l.*).

The Court of Appeal (Lord Wright M.R., Romer and Greene L.JJ.) has decided both contentions against the Commissioners, that is, in favour of the company, and your

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H. L. (E.) Lordships have had the advantage of some interesting arguments on both points.

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Sect. 27 has been under consideration in this House on two occasions, first, in *Inland Revenue Commissioners v. Dalgety & Co.* (1), and secondly, in *Assam Railways and Trading Co. v. Inland Revenue Commissioners.* (2) In the *Dalgety* case (1) the company, which was incorporated in England, carried on a trade mainly in Australia and New Zealand. It had issued debentures charging its total assets with payment of principal and interest, and in paying the interest on them in this country had deducted (under Rule 19 of the All Schedules Rules) the full amount of the United Kingdom income tax in respect of the interest. The question in dispute was whether, for the purposes of relief under s. 27, the amount of relief was to be calculated on (a) the whole of the profits earned by the company in the Dominions or only on (b) the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom. It was agreed that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as that would suffice to meet it. It was stated that the company paid the Dominion income tax, including that part which was applied in payment of debenture interest, and had not recovered any part of that tax by deduction or otherwise from the debentureholders. (No evidence appears to have been given as to s. 112 of the New Zealand Act, 1916, No. 5, which was in similar terms to s. 116 of the Act of 1923.) It was recognized that if the claim of the company were allowed in full, it would receive back a sum which would cause the amount of profits distributed by way of dividend to escape the full burden of tax measured in terms of the rate imposed in the United Kingdom. Nevertheless it was held that upon the true construction of the section the company was entitled to succeed. There is a passage in the opinion of Lord Buckmaster which may be cited as throwing some light on the present

(1) [1930] A. C. 527.

(2) [1935] A. C. 445.

case. "Taking the words [of the section] in order," he said (1) : "there can be no doubt the company did pay 'United Kingdom Income Tax' on the full amount. 'The Income Tax charged in accordance with the provisions of the Income Tax Acts' was charged on the whole of its profits and gains. Nothing less would have been accepted and no other person was liable to make the payment. But it is urged that even if this be accepted, to the extent of the debenture interest, the payment was made on behalf of the debenture holders. To this extent that is true—namely, that, having paid, the company was entitled to deduct the tax from the debenture interest, and, to the extent of that deduction, it was the debenture holders' tax that was thus discharged. But it was not the debenture holders who made the payment but the company." Lord Warrington (2) put the same conclusion in other words when he said that the contention of the Crown required the words of the section to be read in a sense other than their ordinary and natural meaning, as, for example, "paid" must be read "paid and ultimately borne." Lord Thankerton used substantially the same phrase. (3) Lord Macmillan observed (4) : "Actual payment, not ultimate incidence, is the criterion both of the right of relief and of the right to deduct."

It should be explained that nothing turns as a matter of principle on the fact that it had been agreed (see the report in the Court of Appeal (5)) that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as there was such income available for the purpose. As appears from the figures on pp. 3 and 4 of the same report, that was apparently done in the case stated only for the purpose of preventing a claim for relief in respect of items of income arising solely in the United Kingdom.

My Lords, I do not think it necessary to explain in detail the facts proved and the contentions dealt with in the *Assam* case (6), for that has already been done in the judgment of

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(1) [1930] A. C. 531.

(2) Ibid. 536.

(3) Ibid. 539.

(4) [1930] A. C. 542.

(5) [1930] 1 K. B. 4.

(6) [1935] A. C. 445.

H. L. (E.) Romer L.J. in the Court of Appeal. I agree in all respects with his view as to the conclusions established in that case in this House (1) “(1.) That the word ‘income’ in the section “does not mean the real income but the ‘statutory’ or “‘notional income’ by means of which the tax is calculated. “(2.) That if this statutory income in the Dominion is £A “and in the United Kingdom the statutory income from “the same source is £(A + B) relief will be given in respect “of £A. (3.) That an analysis of the two statutory incomes “for the purpose of comparing for example the respective “allowances for repairs or depreciation is inadmissible.” And he adds later on (2): “Nothing need be regarded except the “two statutory incomes of the business, taking care, of course, “to see that neither includes income from any other source. “Relief will then be given to the extent of the smaller of the “two sums without inquiry into the reasons for the difference “between them.”

In the light of these two authoritative decisions the contentions in this case on behalf of the Crown, as above stated, can now be considered.

Taking first the dispute as to the abatement of partial exemption in respect of land in New Zealand used for the purposes of the company's business (9998*l.*), it is difficult to see how this item is in a different position to that of allowances for repairs or for wear and tear or for bad debts. As was pointed out by Greene L.J. (3) “it must have been present to “the mind of the Legislature that uniformity in the method “of assessing business profits is not to be found throughout the “Empire.” It is only necessary to read through the thirteen clauses of Rule 3 of the Rules to Sch. D, Cases, 1 and 2, of the Income Tax Act, 1918, to see how arbitrary are some of the provisions as regards deduction from profits and gains to be charged, and how improbable an event it would be to find the same clauses in force in the Dominions. The reasons given in the *Assam* case (4), as well as the reasons given by Romer and Greene L.J.J., are sufficient to show that rules which

(1) [1937] 1 K. B. 706.

(2) Ibid. 707.

(3) Ibid. 710.

(4) [1935] A. C. 445.

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determine in the United Kingdom or in a Dominion the allowances or deductions which are permissible for the purposes of assessing a taxpayer to income tax in either country must be disregarded in determining the comparable incomes in those countries provided that the incomes are derived from the same source. See the opinion of my noble and learned friend Lord Wright in the *Assam* case. (1)

To avoid misunderstanding it should be added that there might be an exemption granted by a Dominion Act relating to income tax which justified the inference that certain specific property used for the business was not being taxed at all in the Dominion. Such an exemption might require special consideration, and I need not express an opinion in regard to it. Nor am I dealing here with income from a separate source in the Dominion which is not taxed in the Dominion. In the present case the allowance we are called upon to consider is, I think, clearly within the principle laid down in the *Assam* case. (2) The allowance is one granted as an allowance or deduction for the purpose of ascertaining the statutory amount of the assessable income of the business in New Zealand. The source of the income is the business. No analysis of the component elements of the income, so far as permissible allowances or deductions are concerned, is therefore called for. The land in question is taxed in New Zealand in so far as it is an important factor in producing the profits and gains of the business; and we are not concerned for the purposes of the section with the special exemption given by s. 83. In my opinion, therefore, the claim of the Crown to deduct the sum of 9998*l.* in respect of this item so as to reduce the United Kingdom comparative income fails, and that income must be taken, assuming that the figures above mentioned are correct, to be the sum of 44,468*l.*

There remains the question of the debenture interest (33,609*l.*). The contention of the Crown here is largely rested on the argument that the income in question is not that of the company and that tax upon it has been assessed upon the company (under s. 116 of the New Zealand Act) only as agent of the debenture-

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(1) [1935] A. C. 445, 459.

(2) *Ibid.* 445.

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holders. This argument was I think rather lightly brushed aside in the Court of Appeal; but your Lordships have thought it right carefully to consider the provisions of the Land and Income Tax Act of 1923 in order to see whether there was substance in the argument based on agency. They have noted that there are in each annual taxing Act in New Zealand special rates prescribed for taxing income derived by debenture-holders in companies, and that these rates vary in accordance with the incomes received by the debenture-holders from the debentures held by them. This circumstance tends to support the argument that the company is only being taxed as agent. As I understand the judgments in the Court of Appeal on this point their conclusion on it would be the same as it was even if the debentures had been issued in New Zealand and, the interest being payable there, the company had deducted the whole of the tax in respect of the debenture interest. This may be the right view; but it does not seem to me to be necessary at the present time to decide the case on that ground. In the circumstances I have suggested it might perhaps be a true conclusion to draw from the New Zealand Act that the tax paid there in respect of the interest on the debentures was not tax in respect of the company's income and so not within the words of the section "has paid "Dominion income tax . . . in respect of the same part of his "income," giving due emphasis to the possessive pronoun.

In the present case the circumstances are different to those I have suggested. There cannot be a real agency without a principal, and I am unable to see how the company can be in any true sense an agent to pay tax for debenture-holders who are not liable to pay it. The company has been allowed under s. 80 (*h*) to deduct the amount of the interest on debenture capital employed in the production of assessable income from such income, but it is liable under s. 116 of the same Act to pay income tax on the amount of the interest payable on all the debentures and that in a case where the company cannot recover according to our law, which must apply here, any part of the tax so paid. My Lords, I am of opinion that the argument based on agency fails and that in such a case the interest

paid in respect of the debentures under s. 116 must be added to the company's statutory income in New Zealand (26,592*l.*) as forming part of the profits assessable in New Zealand. I come to this conclusion on substantially the same grounds as those which actuated this House in the *Dalgety* case. (1) The tax paid on the interest in question was paid in New Zealand and also ultimately borne by the company and it was so paid in respect of the company's income. There is no other person receiving income on whose behalf it could have been paid. Accordingly the New Zealand comparative income must be taken to be 26,592*l.* plus 33,609*l.* making a total of 60,201*l.*

If these figures are correct and if there were not, as we are told there are, certain further subsidiary matters to be considered, the result would be that the United Kingdom comparative income would be 44,468*l.* and the New Zealand comparative income would be 60,201*l.*, with the consequence that the smaller sum would be that in respect of which (as explained in the *Assam* case (2)) relief could be afforded under the section. We are, however, not concerned with figures, but with the principles stated in the judgments of the Court of Appeal. With these principles, subject to a slight difference of opinion as to the ground on which the question of the debenture interest should preferably be decided, I entirely agree. The appeal should I think be dismissed with costs; but it will probably be right to modify the language of the order of the Court of Appeal by adding to the words "in accordance with "the judgments of the Court" (after the order remitting the matter to the Commissioners) the words "and of this House."

LORD ATKIN. My Lords, I concur in the opinion which I have just read.

LORD THANKERTON. My Lords, I also concur in the opinion of my noble and learned friend the Lord Chancellor; and with regard to his opinion on the debenture interest question, I also desire to reserve my opinion on the wider ground to which he has referred, and to confine myself to the facts of this present case.

(1) [1930] A. C. 527.

(2) [1935] A. C. 445.

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H. L. (E.) LORD RUSSELL OF KILLOWEN. My Lords, I agree.

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LORD MACMILLAN. My Lords, in the fiscal year 1928-29 the respondent company paid income tax both in the United Kingdom and in the Dominion of New Zealand. The question is to what extent this fact entitles them to relief from United Kingdom income tax under s. 27 of the Finance Act, 1920.

It is a condition of relief under that section that the taxpayer shall have paid tax both in the United Kingdom and in the Dominion in respect of the same part of his income and for the same year. In the present case no question arises as to the identity of the year of charge. Both here and in the Dominion the respondents were taxed in the same fiscal year 1928-29 on the basis of their accounts for their own financial year to September 30, 1927. The computation of their statutory income for tax purposes in both countries was thus based on the same set of figures. But the methods of computation of income for tax purposes and in particular the permissible deductions differ materially in the United Kingdom and in New Zealand. Consequently, starting from the same figures, the assessing authorities in this country and in the Dominion arrived at different sums as representing the statutory assessable income of the respondents in their respective jurisdictions. Hence arises the problem of ascertaining the common fund which is to be taken as having been taxed in both countries.

As regards the United Kingdom, the profits of the respondents' business were assessed here for 1928-29 at 70,017*l.* But the respondents did not maintain at your Lordships' bar that they could claim relief in respect of the whole of this sum as having also borne tax in New Zealand. They conceded that it must be reduced to 44,468*l.* by deducting certain profits made in the United Kingdom and not included in the New Zealand assessment and also certain items not taxed in New Zealand.

Then as regards New Zealand the result of applying the methods of computation prescribed by the Land and Income Tax Act of that Dominion was to bring out an assessable income of only 26,592*l.* The difference between the results of

the two methods of computation was chiefly accounted for by the fact that in the United Kingdom interest paid on debentures is not a permissible deduction, while in New Zealand such interest is deductible if payable on capital employed in the production of the assessable income. This item, deducted in the New Zealand computation, amounted to 33,609*l.*, and the main controversy in the present appeal was concerned with the question of its true position in law.

I have said that this debenture interest was under the New Zealand Act deductible in computing the respondents' assessable income in the Dominion. But that is not the whole story. The Act after permitting the deduction of debenture interest goes on to provide that every company which has issued debentures shall be the agent of all the debenture-holders in respect of all income derived by them from those debentures and shall make returns and be assessable and liable for income tax on that income accordingly. Subsequent sections render every agent personally liable for the tax on income in respect of which he is an agent, and entitle him to recover the amount of the tax paid from his principal either directly or by deduction from any moneys in his hands belonging to or payable to his principal. The tax which the company has to pay as agent is calculated on the basis of the tax payable by the recipients of the debenture interest. While, therefore, the respondents' assessable income was reduced to 26,592*l.* by the deduction (inter alia) of 33,609*l.* of debenture interest, they were nevertheless served with a separate notice assessing them for income tax on this latter sum in precisely the same terms as the notice of assessment in respect of the 26,592*l.*, except that the words "As agent for debenture-holders" were written below the amount brought out as due.

The respondents duly paid, as they were in law bound to pay, the amounts of tax brought out in both notices of assessment. The question is whether they can be said to have paid Dominion income tax on the 33,609*l.* of debenture interest within the meaning of s. 27 of the Finance Act, 1920. In my opinion they can. It is true that the theory of the New Zealand Act seems to be that the debenture interest is to be regarded as income of the

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recipients and that the company is to be regarded as their agent in paying the tax. But this artificial method of treating the debenture interest, no doubt devised for administrative reasons, does not alter the substance of the matter. It remains true that the money applied in payment of the debenture interest is part of the revenue of the company and that they are assessable and liable for tax on it. They have to pay the tax in any event, and so far as the financial effect is concerned the only difference between the tax which they pay as principal and the tax which they pay as agent is that they are given a right of recovery from the debenture-holders of the tax paid on the debenture interest. But in the United Kingdom a company on paying its debenture interest is also entitled to deduct tax and so recoup itself. Nevertheless the company, notwithstanding this right of recoupment, is held to have paid United Kingdom income tax on the amount of its debenture interest within the meaning of s. 27 of the Finance Act, 1920. The right of recoupment conferred by the New Zealand Act on the company which pays tax "as agent" on the debenture interest which it pays to its debenture-holders is similarly, in my opinion, irrelevant for the present purpose. If I may quote my own words in *Inland Revenue Commissioners v. Dalgety & Co.* (1): "Actual payment, not ultimate incidence, is "the criterion both of the right of relief and of the right to "deduct."

Between the United Kingdom system and the New Zealand system there is really only a difference of method. In the United Kingdom the debenture interest is not deductible and is assessed along with the rest of the company's income, but the company is entitled to recover the tax from the recipients: in New Zealand the debenture interest is deductible but is nevertheless assessed to tax separately in the company's hands, the company being entitled to recoup itself from the debenture-holders for the tax paid. In substance the result is the same with this difference only, that the rate of tax on the debenture interest is calculated in New Zealand on the basis of the recipients' liability. The principle of s. 27 is that the same fund

(1) [1930] A. C. 527, 542.

of income shall not bear the full burden of both United Kingdom and Dominion income tax, and in the present instance it is clear that the 33,609*l.* of debenture interest has both here and in New Zealand been subjected, though under different schemes, to the full burden of income tax. I may remind your Lordships that the view was at one time taken in this country by high authorities that a company paying income tax on its profits did so as agent for its shareholders : cf. *Attorney-General v. Ashton Gas Co.* (1) and contra, *Inland Revenue Commissioners v. Blott.* (2)

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I have not hitherto adverted to the circumstance that in this particular case the respondents are unable in fact to exercise the right of recoupment conferred on them by the New Zealand statute and consequently cannot reimburse themselves for the tax which they have paid "as agents," inasmuch as the contracts under which the interest was payable were made in the United Kingdom. Thus ultimately as well as primarily the burden of the New Zealand tax rests upon them. I understand that your Lordships regard this special circumstance as affording the most satisfactory ground for holding that the respondents' claim to relief has been justified, without finding it necessary to adopt in this case the more general ground which has commended itself to me. The result, whether the broader or the narrower ground is taken, is fortunately the same so far as the present appeals are concerned.

Accordingly I think that for the purposes of s. 27 the respondents should be taken to have paid United Kingdom income tax on 44,468*l.* and Dominion income tax on 26,592*l.* + 33,609*l.* = 60,201*l.* Applying the principle of the decision in *Assam Railways and Trading Co. v. Inland Revenue Commissioners* (3) I should find that the respondents are entitled to relief in respect of 44,468*l.*, being the part of their income which has borne both taxes.

I have dealt only with the single year 1928-29, although the appeals relate to a series of years, for the considerations applying to the other years are the same. And I have

(1) [1904] 2 Ch. 621 ; [1906] A. C. 10.

(3) [1935] A. C. 445.

(2) [1921] 2 A. C. 171, 201.

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confined my observations to the question of the debenture interest, for the reason that on the other topics which have been raised I have not felt that I could usefully add anything to the full and adequate treatment which they have received in the opinion of the Lord Chancellor, which I have had the advantage of reading in print.

I agree that the appeals should be dismissed with costs.

Appeal dismissed.

Solicitor for appellants : *Solicitor of Inland Revenue.*

Solicitors for respondents : *Freshfields, Leese & Munns.*

[HOUSE OF LORDS.]

A. BAILY AND COMPANY, LIMITED . APPELLANTS ; H. L. (E.)*

AND

CLARK, SON AND MORLAND . . . RESPONDENTS. 1938
Feb. 25, 28 ;
March 1, 3,
4, 7 ;
April 12.

Trade mark—Geographical name—" Glastonburys "—Whether distinctive and registrable—Trade Marks Acts, 1905-1919 (5 Edw. 7, c. 15, ss. 3, 9 ; 9 & 10 Geo. 5, c. 79).

Distinctiveness in fact is not conclusive upon the questions whether a mark is " distinctive " as defined in s. 9 of the Trade Marks Act, 1905, and whether it ought to be registered. The mark must, to be registrable, be " adapted to distinguish," which brings within the purview of the Registrar's discretion the wider field of the interests of strangers and the public.

Observations of Lord Parker in *Registrar of Trade Marks v. W. & G. Du Cros, Ltd.* [1913] A. C. 624, 637, and of Hamilton L.J. in *In re R. J. Lea, Ltd.'s Application* [1913] 1 Ch. 446, 463 applied.

Both the appellants and the respondents had for many years carried on business in the town of Glastonbury as makers of sheepskin slippers. In 1933 the respondents, alleging distinctiveness, obtained registration as a trade mark of the word " Glastonburys " in connection with sheepskin slippers. At that date the appellants were not aware that the respondents had obtained registration of this mark, but on becoming aware of it later they applied by motion to rectify the register by expunging it :—

Held, that although the mark was distinctive in fact, it was not " adapted to distinguish " the respondents' goods from those of other manufacturers of similar goods in the town of Glastonbury, who ought not to be hampered or restricted, by the presence of the mark on the register, in selecting the particular form of words by which they might desire to describe their goods as being products of a town which, in fact, enjoyed a reputation in connection with the manufacture of sheepskin slippers.

Decision of Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal.

The appellants and their predecessors in business had carried on business in Glastonbury in sheepskin goods since 1867. From 1867 to 1882 they made sheepskin slippers, and from 1928 onwards they had again manufactured and sold

* *Present* : LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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sheepskin slippers which had branded on their soles a representation of some ruins near Glastonbury, together with the words "A. Baily & Co. Ltd., Glastonbury, England," "made "in Glastonbury" and "ABCO Brand Sheepskin Slippers."

The respondents and their predecessors had carried on business in Glastonbury in sheepskin goods since 1870. Between 1920 and 1924 they manufactured sheepskin slippers and sold them to a separate and independent firm, who marketed the slippers under their own trade marks. In 1924 the respondents commenced to sell sheepskin overshoes direct to retailers; in 1925 they extended such sale to sheepskin slipper-shoes; and in 1926 to sheepskin slippers. They did not brand any of these goods till 1926, when they began to apply a brand consisting of two arches together with the word "Glastonburys." In 1924 they obtained registration of a trade mark for motoring overshoes with the words "Glastonbury Motoring Overshoes," but they disclaimed any exclusive right to the use of the word "Glastonbury"; in 1927 they obtained registration of a trade mark for "motor "overshoes, slippers and slipper shoes all made in England," having the two arches together with the word "Glastonburys," but again they disclaimed any exclusive right to the use of the word "Glastonburys." In 1933 the respondents, alleging distinctiveness, obtained registration as a trade mark of the word "Glastonburys" for slippers of their manufacture.

The appellants said that, being unaware that the respondents had applied for the registration of the mark "Glastonburys," they did not oppose the application, as otherwise they would have done; but at a later date, on becoming aware of the registration of that mark, they applied by motion for a rectification of the register by expunging therefrom the said trade mark "Glastonburys," alleging that they were persons aggrieved.

Clauson J. on the hearing of that motion held that in spite of the final "s" "Glastonburys" was a geographical name which was *prima facie* unregistrable under s. 9 of the Trade Marks Acts, 1905-1919; that the evidence was insufficient to prove the word "Glastonburys" as generally distinctive of the respondents' goods; that the word was not adapted

to distinguish ; and that the presence of the trade mark on the register would cause confusion, notwithstanding the provisions of s. 44 of the said Acts.

On appeal by the present respondents, the Court of Appeal (Lord Wright M.R., and Romer and Greene L.JJ.) held that the word "Glastonburys" had become distinctive ; that it had acquired a secondary meaning ; and that it indicated exclusively the respondents' goods. Accordingly the appeal was allowed.

A. Baily & Co., Ltd., now appealed to this House.

K. E. Shelley K.C. and *Guy Aldous* for the appellants. No attempt was made by the present respondents to show that the mark "Glastonburys" was inherently distinctive, but they contended that it was distinctive by user in connection with slippers. Even if it could be established by evidence that a mark is distinctive in a limited area, it is not necessarily registrable : *T. & C. Associated Industries v. Victoria Wagon Works* (1) ; see also *In re Lea's Application*. (2) In *In re Liverpool Electric Cable Co., Ltd.'s Application* (3) it was said that in considering whether a geographical name is registrable both the locality and the goods must be taken into consideration, and that the name of such an important commercial centre as Liverpool, even though it might in fact be distinctive of the goods in respect of which registration was sought, was not registrable. In this case the word "Glastonburys," we say, does not even distinguish the respondents' goods, seeing that another company—the present appellants—trade in the same area—a district which enjoys a special reputation for the manufacture of this class of goods—and in the same kind of slippers. The word "Glastonburys" merely means the town of Glastonbury, and the respondents cannot claim a monopoly of its use. *In re Crosfield's Application* (4) establishes this, that if it is found that the mark might legitimately be required by another trader to indicate that his goods were made in the same town—in this instance

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(1) (1930) 48 R. P. C. 148, 153. (3) (1928) 46 R. P. C. 99.

(2) (1913) 30 R. P. C. 216.

(4) (1909) 26 R. P. C. 837.

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Glastonbury—that would be a reason against allowing registration of the name of the town. There is no evidence showing that with the general public the word “Glastonburys” distinguishes the respondents’ goods. The fact that by some engaged in the trade the mark is understood to indicate that the goods are the manufacture of the respondents, does not warrant the conclusion that even throughout the town of Glastonbury the word is regarded as distinctive of the respondents’ goods. In *In re Boots Pure Drug Co.’s Trade Mark* (1), where it was held that the word “Livron,” which, according to its ordinary signification, was a geographical name, was not registrable, Sir Wilfrid Greene M.R. said (2) that “if the Registrar had had all the matter before him “which is before this Court he would have been wrong if he “had granted registration of this mark, because the mark “being ex hypothesi the name of a place, and the name of “a place where medicines of a similar character are manufactured, and it appearing that the business in medicines is “of an international character, I cannot see myself how the “Registrar could, with any propriety, have held that the mark “was distinctive”—language which is exactly apposite to the present case. In *Registrar of Trade Marks v. W. & G. Du Cros* (3) Lord Parker said (4) that on an application for registration one of the matters to be considered by the Registrar is “whether other traders are likely, in the ordinary course of “their business and without any improper motive, to desire “to use the same mark, or some mark nearly resembling it, “upon or in connection with their own goods”—language again exactly applicable in the present case.

Trevor Watson K.C., R. E. Burrell K.C., and G. H. Lloyd-Jacob for the respondents. The fact that goods are asked for in a particular way is evidence that they have acquired a reputation under that name with the public; and that has been established in relation to the respondents’ goods. It is said for the appellants that registration of the mark should have been refused because the name “Glastonbury”

(1) [1938] 1 Ch. 54.

(2) *Ibid.* 68.

(3) [1913] A. C. 624.

(4) *Ibid.* 635.

has a special reputation in connection with this class of goods ; but in considering whether a mark is registrable the Court may consider the extent to which the user has rendered it distinctive ; and the ultimate question is, is the mark adapted to distinguish the goods of the respondents ? The Trade Marks Acts do not countenance the view that any particular standard of user is set up ; in fact they negative such a view. No doubt, where it is sought to register a geographical name, its identification with the public in connection with such user must be shown. The mark has to be distinctive in the market, but this test, we submit, has been satisfied in the present case, as it has been shown by the evidence that the mark is generally known among retailers in this trade. Distinctiveness is, of course, a matter of degree ; but in this case it has been established by the respondents. In *In re Crosfield's Application* (1), which has been relied on by the appellants, Moulton L.J. said that he arrived at his conclusion with regret, because a large number of people in the north of England recognized the mark there in question—"Perfection"—as distinguishing the goods of the makers. Here we have proved such an amount of user as to render the mark distinctive. As is said in Kerly on Trade Marks, 6th ed., p. 190 : "it is not necessary that an applicant's "trade under the mark should extend to the three countries "of the Union in order that he may have the benefit "of paragraph 5 " [of s. 9 of the Trade Marks Act], "but "that it is sufficient that it extends over a considerable area, "and that in that area the mark is distinctive of his goods, "not to all persons nor to the public generally, but to the "public concerned in the class of goods in question." [*In re Burford & Co.'s Application* (2) was also referred to.]

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The House took time for consideration.

1938. April 12. LORD MAUGHAM L.C. My Lords, this appeal raises a question in relation to a registered trade mark, "Glastonburys," which had been registered by the respondents

(1) 26 R. P. C. 837.

(2) (1919) 36 R. P. C. 139.

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Clauson J., ordered the trade mark to be expunged from the register. The Court of Appeal, taking another view of the facts, overruled that decision. Hence the present appeal.

I have had the advantage of reading the opinion of my noble and learned friend, Lord Russell of Killowen, who has sufficiently stated the facts, which it is unnecessary for me to repeat. The trade mark was registered under s. 9 of the Trade Marks Acts, 1905 to 1919, on an application by the respondents dated November 23, 1933. The respondents had in fact begun to use the word "Glastonburys" as a trade mark applied to their slippers in the year 1931. It is agreed that Glastonbury is a geographical name, and that the addition of the letter "s" at the end of it makes no difference to the questions which your Lordships have to determine. It is a word which could not be registered as a trade mark under any of the first four sub-sections of s. 9, and in the circumstances of the case it could only be registered, if at all, under sub-s. 5 upon evidence that it was distinctive, a word which in this connection is defined to mean "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." The sub-section further provides that "in determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use"—which was here the case—"take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

My Lords, I think it desirable to emphasize the fact that we are not here concerned with the registration of a geographical name selected by the proprietor of the goods under such circumstances that it is in effect a fancy name. For instance, as was suggested by counsel for the respondents in his able argument, such a trade mark as the words "North Pole" in connection with bananas would be the use of a geographical name dislocated, or disconnected from the origin of the goods; a number of other illustrations, perhaps not happier than that

one, can plainly be given. We are here dealing with the name of an ancient and historic town in the west of England, remarkable, it may be added, for some beautiful ancient buildings, which is, on the one hand, the town in which the respondents actually manufacture the slippers and slipper-shoes which are sold under the mark, and, on the other, the town in which the appellants had actually carried on business in the sale of slippers during the years 1867-1882 and also from the year 1928 until the present day. In a case where the geographical name put forward for registration is the name of the actual town or place where the goods are made to the knowledge of the trade and the public, special considerations apply to the questions which fall to be determined under s. 9, sub-s. 5, of the Act, since it is at least probable that members of the trade and the public will begin by thinking that the mere geographical name is being used to indicate the place of manufacture. It should be noted also that the registration of this mark gave to the respondents the monopoly conferred by the Act (subject of course to s. 44) in relation to all sorts and descriptions of slippers, whether or not made from sheepskins, and whether or not made at Glastonbury. At the date of registration the respondents and the appellants had been engaged in the manufacture of sheepskin slippers at Glastonbury tanned with the wool left on the skins; and it was proved that Glastonbury enjoys a certain reputation in connection with sheepskins tanned with the wool on, just as numerous towns in England enjoy a reputation in connection with the making of other goods, such as steel, blankets, straw hats, carpets, boots, buns, and scores of other articles. It is clear that the name Glastonbury used in connection with slippers might indicate, first, that they were made at Glastonbury, or, secondly, that they were made (there or elsewhere) out of skins tanned in a special manner commonly used at Glastonbury, or, thirdly, that they were slippers made, or marketed, irrespective of place of manufacture and of materials, by a particular manufacturer. Moreover, the word in some minds might indicate more than one of these facts, or might leave the purchaser guessing

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which of the three was indicated. In such a case, as it seems to me, the evidence that the third only of the above meanings would in general be attached to the word by the trade and the public ought to be particularly cogent and convincing.

My Lords, it is not in dispute that the respondents in the circumstances of this case were called upon to prove by evidence that the word "Glastonbury" or "Glastonburys" alone had become, at the date of registration, adapted to distinguish their goods from those of other persons, and it is further admitted that, even if that question were answered in the affirmative, the tribunal was not bound to allow registration. One of the questions to be determined on this second branch of the case is whether the registration of the trade mark would be likely to cause substantial difficulty or confusion, in view of the rights of other traders to use the name of the place where they do, or may in the future, manufacture similar goods. As I read the judgment of the learned trial judge, he decided both questions in favour of the appellants. Upon the evidence he came to the conclusion that it fell far short of what was required to show that the word in fact was adapted to distinguish the goods from those of other persons; and he also held that the registration of the trade mark would cause substantial difficulty or confusion and, as I understand the judgment, that the protection afforded to other traders under s. 44 of the Act would not sufficiently protect other traders, or obviate the confusion that might arise.

My Lords, I have considered with the greatest respect the view of the facts taken in the Court of Appeal in overruling on the first point the judgment of the trial judge. I feel bound to prefer his view. I should observe that there appears to be no case in which the use of such a geographical name as we are dealing with, for so short a time prior to the registration of the mark, has been held sufficient to establish that the mark is adapted to distinguish. It is, I think, very difficult in such a case to establish that the place where the goods are manufactured has come to indicate, not a geographical fact, but the goods of the manufacturer. Moreover, I am of opinion that a great deal, if not the bulk, of the

evidence relied on by the respondents was evidence of little weight. If a manufacturer in a particular town chooses for some years to use the name of the town as a trade mark in respect of his goods, and then (whilst still manufacturing there) proceeds to ask all his trade customers what the name of the town indicates to them, it is, I think, inevitable that many of them will reply that the name indicates to them the manufacture of the person from whom they have been in the habit of procuring the goods. The association of the goods with the place is not, in my opinion, thereby negatived. Accordingly, for my part, I attach small weight to the affidavits of the respondents' customers—all of them, or nearly all of them, framed in the same words—stating that the name of "Glastonburys," when used in connection with slipper-shoes and over-shoes, indicates the respondents' goods to the exclusion of those of all other manufacturers. I should add that it is plain that such a customer of the respondents can only give evidence as to what the name means to him and that he is not entitled to give evidence as to what the name would mean to any one else in the trade or to the public. Evidence as to the meaning which members of the public, actual or probable buyers of sheepskin slippers, would attach to the word is exceedingly scanty. In the view I take of the evidence given by customers of the respondents the conclusion is almost inevitable that the opinion of the trial judge on the question whether the evidence was sufficient to prove that the mark was a mark adapted to distinguish the goods of the respondents from those of other persons was correct.

My Lords, on the second question as to whether, assuming that the mark had been proved among some class of people to be in fact distinctive of the goods of the respondents, it was proper to allow the mark to be registered, I have little to add to the views expressed in the opinion of my noble and learned friend, Lord Russell of Killowen. The decisions of this House in the case of *Registrar of Trade Marks v. W. & G. Du Cros, Ltd.* (1), and of the Court of Appeal in *In re Liverpool Electric Cable Co., Ltd.'s Application* (2) are, I think,

(1) [1913] A. C. 624.

(2) (1928) 46 R. P. C. 99.

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strongly in favour of his views, which are also supported by a valuable judgment delivered by Lord Sumner (when Hamilton L.J.) in *In re R. J. Lea, Ld.'s Application*. (1) Sect. 44 of the Act is by no means a sufficient answer to the argument that a trader, who carries on business in the manufacture and sale of the goods or some of the goods included in the class for which registration has been obtained, is likely to find substantial difficulty in carrying on his business if the name of his town is registered as a trade mark, and that confusion is likely to be caused by his use of the name. A number of examples might be given. For example, a trader in sheepskin slippers carrying on business in Glastonbury might well be desirous of using as his common law mark a picture of the Abbey or of the Glastonbury Tor, with the word "Glastonbury" in small print beneath it, accompanied or unaccompanied by his own name printed on some part of the label. In short, I am unable to see why the respondents in the circumstances which exist in this case should be allowed to gain such a monopoly in respect of the word "Glastonbury" as might place a trader in Glastonbury, desirous of making a perfectly honest use of the word, in a position of grave difficulty, and might cause confusion in the minds of purchasers. I do not think it necessary to repeat the observations made in the opinion, to which I have already referred, and in which I entirely agree; nor should I have added anything but for the great respect which I bear to the Court of Appeal.

My Lords, in my opinion this appeal should be allowed with costs here and below.

LORD ATKIN (read by LORD THANKERTON). My Lords, I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Russell of Killowen, and as I agree with the result at which he arrives and the reasons for his decision, I desire to say but a few words. I myself agree with the finding of the Court of Appeal on the issue whether the word "Glastonburys" had become

distinctive in fact. I should regard the evidence called by the respondents of overwhelming strength, and it would I think be undervaluing it to say that it proves distinctiveness in the trade only. Reliable evidence by salesmen in retail shops or departments that their customers ask for goods by the trade mark name, and that they supply them to the customer under that name, appears to me direct evidence, and indeed the best evidence, that the word is in fact distinctive. If the witnesses are credible, I do not see that they are reinforced by calling a customer or customers to speak to the same effect. And I do not myself feel that any just criticism is to be passed on the judgment of the then Master of the Rolls, Lord Wright, pointing out that the appellants' witnesses who verified their letters were not in the trade and not qualified as such. The letters in question were written in answer to a form of letter addressed to them by the appellants as members of the trade, "If you were offered in the ordinary way of trade slippers," etc. It seems to me a fair criticism to say that such a letter can only refer to an offer in the slipper trade, and that the witnesses who replied to it had no such trade experience.

I assume therefore that the respondents proved that the word was distinctive in fact, but for the reasons given by my noble and learned friend, I think it was not "adapted to distinguish." It matters little whether one says that in the circumstances the word was incapable of being adapted to distinguish, or that in the exercise of his discretion the Registrar should refuse to register. I myself prefer to say that, in circumstances like the present, where the applicant seeks to register the name of the town in which both he and competitors with himself are engaged in manufacturing the same class of goods, the name is incapable of being adapted to distinguish. It should at the outset be considered unregistrable. I do not find it necessary to invoke s. 44, the object of which appears to be to give protection to traders in respect of a name which is registered and must be treated as adapted to distinguish, and not to afford a guide as to whether a name

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LORD THANKERTON. My Lords, for myself I desire to express my concurrence in the opinion of my noble and learned friend on the Woolsack, and also in the opinion of my noble and learned friend Lord Russell of Killowen, which I have had the privilege of reading.

LORD RUSSELL OF KILLOWEN (read by LORD MACMILLAN). My Lords, in this case the respondents obtained (upon an application dated November 23, 1933) the entry upon the register of trade marks of a mark consisting of the word "Glastonburys" registered under No. 546,401 in Class 38 in respect of "Slippers, slipper-shoes and motor overshoes." Notwithstanding that the application had been duly advertised, the appellants were unaware of it, and did not oppose the registration; but on May 23, 1935, they by notice of motion of that date applied to have the register rectified by expunging the mark therefrom.

By an order of the Chancery Division made by Clauson J. on July 14, 1936, it was ordered that the register be rectified as asked. The respondents appealed, and by an order of the Court of Appeal, dated January 13, 1937, the order of Clauson J. was discharged, and the motion to rectify was dismissed. The appellants have now appealed to your Lordships' House, and seek to have the order of Clauson J. restored.

The relevant facts must be stated. Glastonbury is a town in Somersetshire, in which both the appellants and the respondents manufacture what may be termed sheepskin goods, including leather slippers made from sheepskins which have been tanned with the wool left on them, the wool making a warm and cosy lining to the slippers. In the year 1909 the appellants took over the business of a firm called A. Baily & Co., who had been established in Glastonbury since the year 1867. In the year 1899 the respondents took over the business of one Morland which had been established in Glastonbury a

few years after A. Baily & Co. A. Baily & Co. manufactured sheepskin slippers until about the year 1882, when they ceased to make them. The respondents began to make them in or about the year 1920, and have continued to do so until the present time. In 1924 they registered a trade mark in respect of motor overshoes consisting of a pictorial representation of two arches, and containing (amongst other words) the word "Glastonbury," but the exclusive use of that word was disclaimed. In the year 1927 they registered a trade mark in respect of motor overshoes, slippers and slipper-shoes consisting of a similar pictorial representation, and containing (amongst other words and letters) the word "Glastonburys," but again the exclusive use of that word was disclaimed. In 1928 the appellants resumed, and have ever since continued, the manufacture in Glastonbury of these sheepskin slippers made of skins tanned by them with the wool on. In 1931 the respondents began to mark their slippers with the single word "Glastonburys."

Two years later the respondents made their application to register as a trade mark the single word "Glastonburys." It is conceded that the addition of the letter "s" makes no difference, and that the word could not be registered under para. 4 of s. 9 of the Trade Marks Acts, 1905 to 1919, but could only be registered under para. 5 of that section. Under that paragraph it is not registrable at all except upon evidence of its distinctiveness as defined, i.e., except upon evidence that it was adapted to distinguish the goods of the respondents from those of others. But the authorities show, as will appear later, that it by no means follows that, if the necessary evidence of distinctiveness is forthcoming, the mark must or ought to be registered.

Clauson J., who heard the witnesses, came to the conclusion, with the evidence fresh in his mind, and upon a consideration of the whole of it, that the evidence fell very far short of what was required to show that the word in question was in fact distinctive for the goods. It was, he thought, impossible to hold that the mark was adapted to distinguish the goods of the respondents from those of other persons; rather was

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it adapted to occasion confusion between the goods of the respondents and similar goods manufactured by another firm (meaning the appellants) long established in Glastonbury, who in fact were selling those goods.

The Court of Appeal took a different view of the evidence, and held that the word " Glastonburys " had become distinctive in fact, because it had achieved a secondary meaning as indicating the goods of the respondents. Having arrived at that conclusion upon the question of fact, they allowed the appeal.

My Lords, if it were necessary for the purpose of our decision on this appeal to express a view as to the effect of the evidence, I would, speaking for myself, agree with Clauson J. that it falls far short of establishing that the geographical name " Glastonburys " when applied to slippers had in the space of some two or three years come to indicate primarily, not that the slippers were made in Glastonbury, but that they were made (presumably anywhere) by a particular manufacturer. That the word bore this signification in the trade is not enough ; though it is a fact which may be taken into consideration by the tribunal under para. 5 of s. 9. In the case of household articles in general use such as slippers, the meaning which the word in question conveys to the purchasing public is of vital importance. In the present case the direct evidence given by the public does not support the view of distinctiveness. No such direct evidence was tendered by the respondents. It is true that some of the trade witnesses testified that their customers ordered " Glastonburys " or " Glastonbury Slippers," and that in response to such orders they supplied the respondents' goods ; but this evidence (in the absence of the customer's explanation) is subject to the criticism that such expressions may in fact only have been used as indicative of the place of manufacture.

But I am prepared to decide this appeal upon the assumption that the true view of the evidence is that which was adopted by the Court of Appeal. Even upon that footing I am of opinion that upon the facts of this case this appeal should be allowed. It appears to me to be, from one aspect, a

stronger case for refusing registration than the case of *In re Liverpool Electric Cable Co., Ltd.'s Application*. (1) That decision laid down no new law. It was based upon the view, well established by previous authority, that distinctiveness in fact is not conclusive upon the questions whether a mark is "distinctive" as defined in s. 9, and whether it ought to be registered. Let me cite from the speech of Lord Parker in *Registrar of Trade Marks v. W. & G. Du Cros, Ltd.* (2), which expressed the unanimous views of your Lordships' House. He said: "But the tribunal is not bound to allow registration even if the mark be in fact distinctive. A common law mark is still not necessarily registrable. If the tribunal finds that a mark is anywhere, or among any class of people, in fact, distinctive of the goods of the applicant, it may be influenced by this fact in determining whether it is adapted to distinguish these goods from those of other persons, but distinctiveness in fact is not conclusive, and the extent to which the tribunal will be influenced by it must, in my opinion, depend on all the circumstances, including the area within which and the period during which such distinctiveness in fact can be predicated of the mark in question." Much the same views had been expressed by Hamilton L.J. in *In re R. J. Lea, Ltd.'s Application* (3), when he said: "Further the Act says 'adapted to distinguish'; the mere proof or admission that a mark does in fact distinguish does not ipso facto compel the judge to deem that mark to be distinctive. It must be further 'adapted to distinguish,' which brings within the purview of his discretion the wider field of the interests of strangers and of the public."

Now what are the salient facts of the present case? The word "Glastonburys" is an obviously geographical name indicating a locality—namely, the town of Glastonbury. In the town of Glastonbury there are (and were at the date of the registration) two manufacturers of these sheepskin slippers—namely, the appellants and the respondents. The town of

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(1) 46 R. P. C. 99.

(2) [1913] A. C. 624, 637.

(3) [1913] 1 Ch. 446, 463.

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Glastonbury enjoys a reputation connected with sheepskin slippers, arising from the fact that it is famous for its efficient tanning of the sheepskins with the wool on, which are used in their manufacture. The buyer for the shoe department of Frederick Gorrings, Ltd., testified as follows: "It is customary for manufacturers of slippers whose factories are not situated in Glastonbury to make a big selling point of the fact that the skins from which their slippers are made were either tanned or finished in Glastonbury, and they therefore expect to obtain better prices solely for the reason that their skins had been treated in Glastonbury. I have always been prepared to pay more for a slipper which has been produced from a skin treated in Glastonbury than one treated elsewhere as there is something in the Glastonbury tanning which does not appear to be produced elsewhere."

In these circumstances ought the word "Glastonburys" to have been registered as a trade mark for slippers in the first instance, and ought it now to be allowed to remain on the register? In my opinion the answer to each question should be in the negative. With the mark on the register, no person who manufactured slippers in Glastonbury or sold slippers manufactured by some one else in Glastonbury, could advertise his goods as being what in fact they were—namely, Glastonbury slippers. It is no answer to say that the appellants can, notwithstanding the registration, continue their practice of marking their goods as "made in Glastonbury." They, and any future manufacturers of slippers in Glastonbury, and their respective retail customers, ought not to be hampered or restricted, by the presence of this mark upon the register, in selecting the particular form of words by which they desire to describe their goods as being products of a town which enjoys a reputation in connection with the manufacture of sheepskin slippers. Just as the Court of Appeal in a subsequent case (*In re Boots Pure Drug Co.'s Trade Mark* (1)) thought that the word "Livron" could not properly be registered under para. 5 of s. 9 in respect of tonic medicines for human use, because it was the name of a French town

where similar medicines were manufactured, so, in my opinion, this word "Glastonburys" cannot properly remain on the register in respect of "slippers, slipper-shoes and motor overshoes."

For these reasons I would allow the appeal and restore the order of Clauson J.

My Lords, there are two other matters which arose on the hearing of this appeal to which I think it right to refer.

One passage in the judgment of the Master of the Rolls has given rise to the suggestion that he stated that certain witnesses were not qualified to give evidence on the issue of distinctiveness because they were not engaged in the slipper trade but were merely members of the public. When the context is examined it becomes clear that the Master of the Rolls said no such thing. It would be strange if he had; for in relation to the meaning of the words or marks when applied to goods in everyday use the evidence of the public is of the highest value. The Master of the Rolls was dealing with the evidence of some eleven witnesses who had given evidence, as members of the public, to the effect that by Glastonbury slippers they understood slippers manufactured in Glastonbury. Many of them were in fact persons engaged in various trades, but not in the slipper trade. In regard to them the Master of the Rolls said that they "are not really in the trade at all, are not really familiar with the circumstances of the trade, and are not really qualified to give evidence on the particular issue." It is obvious I think that this language is based on a mistaken belief that the witnesses had been put forward as witnesses engaged in the slipper trade. If that had been the fact the language used would have been true. As members of the public they were without doubt qualified to speak. The Master of the Rolls never meant to suggest a contrary view.

A second matter arose in connection with these witnesses. The appellants circularized 91 members of the public asking them to answer the following question: "If you were offered 'in the ordinary way of trade, slippers described as 'Glastonbury slippers,' what would the word 'Glastonbury' mean

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H. L. (E.) “to you ? ” They received 83 replies. To save expense they only filed affidavits by 11 of those who had replied : but in order to prove that the 11 were a proper and fair sample of the bulk, the remaining 72 replies were exhibited to an affidavit. This procedure was the subject of severe comment in the Court of Appeal. No doubt it was technically wrong ; but the appellants not unnaturally shrank from the great expense of filing some 70 affidavits. It will be wiser perhaps in a similar case in the future to file an affidavit merely stating the number of the other answers which have been received, and that they are open to inspection by the other side’s advisers. The Court will then be protected from the embarrassment of being in possession of documents which are in no sense evidence of the facts stated therein.

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LORD MACMILLAN. My Lords, speaking for myself I desire to express my entire concurrence in the opinion of my noble and learned friend which I have just had the privilege of reading, and also in the opinion which has been delivered from the Woolsack.

Appeal allowed.

Solicitors for appellants : *Woodham Smith & Borradaile.*

Solicitors for respondents : *Bridges, Sawtell & Co., for Gould & Swayne, Glastonbury.*

Considered. *In re GIL-
LETT'S WILL TRUSTS*
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[HOUSE OF LORDS.]

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March 7, 8 ;

April 12.

Will—Accumulations—Direction to accumulate during lives of annuitants—Possibility of period of accumulation exceeding period permitted by law—Gift of residuary property, including accumulations, to charity—Right of charity to stop accumulations—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 164.

A testator, who died on January 1, 1925, by his will gave and devised all his property both real and personal to his trustees upon trust to pay out of the income thereof a large number of annuities, some being to certain religious institutions, and he directed that these last annuities should determine on the death of the last of the personal annuitants. He also gave certain legacies. He further directed that so long as any of the annuitants were alive the balance of the income of the residuary estate and the income resulting therefrom should be accumulated and invested, and subject as aforesaid he gave the whole of his property after the death of the last personal annuitant to the Congregational Union of England and Wales to be invested as capital. The secretary of that charity asked for an order that the trust for accumulation should be determined, and that either the surplus income in each year should be paid to the charity or that proper provision should be made for the payment of the legacies and annuities, and that subject thereto the residuary estate should be transferred to the charity :—

Held, that if any of the annuitants survived the period of twenty-one years from the testator's death, when the accumulations would cease by virtue of s. 164 of the Law of Property Act, 1925, the surplus income down to the death of the last surviving annuitant would be undisposed of and would pass as on an intestacy ; and that the Court ought not to make the order asked for by the residuary legatees, as the effect of such an order would be to prejudice and possibly defeat altogether the possible interests of the persons taking under an intestacy.

Saunders v. Vautier (1841) 4 Beav. 115 held inapplicable ; *Wharton v. Masterman* [1895] A. C. 186 distinguished. Opinion reserved as to the correctness of the decision in *In re Deloitte* [1926] Ch. 56.

Decision of Court of Appeal [1937] 1 Ch. 325 affirmed.

APPEAL from a decision of the Court of Appeal. (1)

The testator, Charles Davey Blake, who died on January 1,

(1) [1937] 1 Ch. 325.

* *Present* : LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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By his will the testator, after disposing of certain specific property, gave and devised all his property both real and personal to his trustees upon trust to pay out of the income thereof a large number of annuities ; he divided the annuities into six groups and directed that they should be paid in the order and preference of those groups. The sixth group contained annuities to certain religious institutions, and the testator directed that those last annuities should determine on the death of the last of the personal annuitants.

On the death of the last of the personal annuitants the testator gave legacies to certain charitable objects, and, after declaring that the above mentioned legacies and annuities were given free of all death duties, he further directed that so long as any of the annuitants were alive the balance of the income of the residuary estate and the income resulting therefrom should be accumulated and invested, but that any deficiency in one year might be made up from the surplus income of any other year, and, subject as aforesaid, he gave the whole of his property after the death of the last personal annuitant to the Congregational Union of England and Wales to be invested as capital, but as regards one-half of the income thereof upon trust to pay the same to the Devon Congregational Union. Both the last mentioned charities were unincorporated bodies.

The personal estate of the testator at his death was valued at 338,000*l.* and his real estate at 22,000*l.*, making a total of 360,000*l.* Since the death of the testator certain of the annuitants had died, and the subsisting annuities at the present time amounted to 2275*l.* The income of the whole estate very greatly exceeded that sum, the surplus income being approximately 12,000*l.*

The Secretary of the Congregational Union of England and Wales, suing on behalf of that charity, took out an originating summons by which he asked that the trust for accumulation

should be determined, and that either the surplus income in each year should be paid to the charity or that proper provision should be made for payment of the legacies and annuities, and that subject thereto the residuary estate should be transferred to the charity.

Bennett J. made an order dated February 13, 1936, by which it was declared (1.) that the gift in the will to the Congregational Union of England and Wales of the whole of the testator's property included the accumulations of income and the income resulting therefrom, but (2.) that the Congregational Union were not entitled to determine any further accumulations, and that in the event of any of the annuities continuing beyond January 1, 1946, the surplus income of the residuary estate and of the accumulations from that date until the cesser of the last annuity would be undisposed of and would devolve as on an intestacy.

The Court of Appeal affirmed Bennett J.'s order, holding that to make the order asked for by the residuary legatees would be to prejudice and possibly defeat altogether the possible interests of the persons taking under an intestacy.

The Congregational Union and the Devon Congregational Union appealed to this House.

Cyril Radcliffe K.C. and *Wilfrid Hunt* for the appellants. The appellants being a charitable organization and as such entitled to relief from income tax under s. 37 of the Income Tax Act, 1918, have brought this action to obtain now the accumulated income to which they are ultimately entitled, so as to obtain exemption from income tax. We submit that Bennett J. and the Court of Appeal were wrong in holding that the accumulation of income, which must stop in 1946, cannot be stopped now on proper provision being made for the annuitants. On the true construction of the testator's will neither the annuities nor the legacies are charged on or payable out of the accumulations of income or the income of such accumulations, and the appellants being the only persons having an interest in these accumulations are entitled to determine the accumulation forthwith. Further, the words

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 —" "of the last personal annuitant" are sufficiently wide to include the surplus income illegally directed to be accumulated. As was said in *Wharton v. Masterman* (1), applying *Saunders v. Vautier* (2), the Court will not enforce a trust for accumulation in which no one has an interest but the legatee; in other words that the direction to accumulate may be put an end to where the direction is exclusively for the benefit of the applicant. The Thellusson Act, and now the Law of Property Act, was intended to prevent the postponement of the beneficial enjoyment by a direction to accumulate, and we contend that it is contrary to the spirit of those enactments for the enjoyment of the appellants' interest to be postponed, if the claims of the legatees and annuitants are, as they would be, fully satisfied.

C. L. Fawell for the appellant, *F. J. Cornish* representing the Devon Congregational Union. So long as the annuitants are sufficiently secured, the appellants are entitled to their gift now. The next of kin are in no way interested. [He cited *Weatherall v. Thornburgh* (3); *Ellis v. Maxwell* (4); *In re Tong, Hilton v. Bradbury*. (5)]

The respondents were not called upon.

A. P. Vanneck for the respondent, *Harry Geen*, the executor.

H. B. Vaisey K.C. and *Gerald R. Upjohn* for the respondent, *Elizabeth Blake*.

Charles Harman K.C. and *A. C. Nesbitt* for the respondents, *Ruby James* and *Muriel Peal Bloomer*.

Alexander Grant K.C. and *A. J. Belsham* for other respondents.

A. Andrewes Uthwatt for the Attorney-General.

The House took time for consideration.

1938. April 12. LORD MAUGHAM L.C. My Lords, the questions raised by this appeal depend upon the true

(1) [1895] A. C. 186.

(2) 4 Beav. 115.

(2) (1877-8) 8 Ch. D. 261.

(4) 3 Beav. 587.

(5) [1930] 2 Ch. 400; [1931]

1 Ch. 202.

construction of the will of the testator, Charles Davey Blake, who died on January 1, 1925, and whose will dated September 14, 1920, was duly proved on March 18, 1925, by Charles Geen (since deceased) and the respondent Harry Geen, the executors therein named.

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By his said will the testator, after appointing executors and trustees and making certain specific devises, gave and devised all the rest of his estate of every sort and description unto his trustees upon trust to pay certain annuities out of the income of his residuary estate to the persons thereafter named to whom he gave the same for their respective lives, and he directed the same to be paid in order of preference and priority by groups as thereafter mentioned, and there followed a series of annuities divided into six groups of which some were personal annuities for individuals and others (being in group six) were annuities for institutions or bodies corporate, and he declared that all the annuities in group six should cease on the death of the last personal annuitant and "on the death of the last personal annuitant" he gave four several legacies (aggregating to 6000*l.*) to the several trustees of certain churches to be invested by them and he declared that all devises and bequests including the annuities were given free of all death duties which were to be paid by his trustees out of his residuary estate, and the will continued as follows: "And I direct that so long as any of the before-mentioned annuities shall be payable the balance of the income of my residuary estate and the resulting income thereof shall be accumulated by my trustees and invested but that any deficiency in income in one year may be made up from the surplus income of any other year and subject as aforesaid I give the whole of my property after the death of the last personal annuitant under this my will to the Congregational Union of England and Wales to be invested as a capital sum but as regards one half of the net income from such investments upon trust to pay the same to the Devon Congregational Union."

The annuities given by the will originally amounted to 3453*l.* By the end of the year 1933, the aggregate of the annuities

H. L. (E.) had been reduced, by deaths, to 2274*l.*, of which more than one-half is payable to the testator's widow, who is more than eighty years of age. The capital of the testator's estate, together with the accumulations of surplus income, amounted on December 31, 1933, to a sum not much less than half a million pounds and there was an annual surplus income exceeding 11,000*l.* It is therefore clear that the net income of the testator's estate is far more than sufficient to provide for the payment of all the annuities and for payment of the legacies amounting to 6000*l.* declared by the testator to be payable on the death of the last personal annuitant. It is easy to understand, and also to sympathize with, the desire of the appellant, who represents the Congregational Union of England and Wales, and of the respondent Frederick John Cornish, who represents the Devon Congregational Union, to put an end to the accumulation directed by the will, of course after making ample provision for the annuitants and the legatees. In what follows I shall use the name of the Congregational Union to describe the Congregational Union of England and Wales and to include in the term the equitable rights of the Devon Congregational Union.

The difficulty arises from the circumstance that the accumulation of income is directed to continue until the death of the last surviving personal annuitant. Since there were originally some forty such annuitants, it is probable that the death of the last of them will not take place, having regard to their ages, till many years after the testator's death. According to the Thellusson Act, now re-enacted in s. 164 of the Law of Property Act, 1925, the accumulation of income for a longer period than a term of twenty-one years from the death of the testator (in the circumstances of this case) is made illegal. The accumulation of income directed by the will must therefore cease on January 1, 1946, but in all probability the gift of the whole of the testator's property "after the "death of the last personal annuitant" will not take effect in possession according to the terms of the will till a number of years after 1946. There is thus an apparent gap in the declared trusts of the surplus income from the year 1946 till

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the death of the last personal annuitant. The Act in effect declares that the income of the property directed to be accumulated during the period after 1946, for so long as the accumulation if valid would have lasted, goes to "the person" or persons who would have been entitled thereto if such "accumulation had not been directed."

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My Lords, the first question which has to be determined on the construction of the will is whether the annuities are charged only on the income of the residuary estate with the result that the capital must be treated as belonging absolutely at the end of the period to the Congregational Union. It seems to me that this contention is ill-founded, if only for the reason that the testator has directed "that any deficiency in income in one year may be made up from the surplus income of any other year." I can see no good reason for reading these last words as meaning "any other subsequent year." The balance of income of past years has no doubt been accumulated. So far, however, as it exists, it is surplus income of some "other year." Any other construction might lead, in the event of a continued deficiency in income, to great hardship in regard to the numerous annuitants of small sums. Moreover the words "subject as aforesaid" which introduce the final gift tend strongly to enforce the view that the Congregational Union gets nothing until all the annuitants have been paid in full. I think therefore that this contention fails.

The next point argued is that the words "I give the whole of my property after the death of the last personal annuitant" are wide enough to include the surplus income illegally directed to be accumulated and released, so to speak, by the Act. It is well settled that the proper method of approach to this question is to construe the will as it stands without regard to the statutory limit of accumulation, and then to consider the effect of the Act upon the dispositions contained in the will. If a specific fund is directed to be accumulated for a period beyond that which is allowed by the Act, the released income (as I shall call the income not validly disposed of by the testator) will generally pass under the residuary gift.

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If the direction refers to the income of residue, the released income, generally speaking, is undisposed of and will devolve (as regards a will coming into operation before 1926) in the case of personal property upon the next of kin and in the case of real property upon the heir: *McDonald v. Bryce* (1); *Elborne v. Goode* (2); *Oddie v. Brown*. (3) On the other hand, there may no doubt be cases where the final gift of residue is so worded as to include all income not effectually disposed of in the preceding dispositions. In the present case such a construction seems to me to be impossible, since it is clear that the Congregational Union is given nothing until the death of the last personal annuitant. The words "after the death of the last personal annuitant" cannot be disregarded; and it is to be observed that the phrase is in effect a repetition of the previous sentence "and on the death of the last personal annuitant" which introduces the gifts of pecuniary legacies to the four named Congregational Churches. It follows that, unless the accumulations can be stopped, the released income down to the death of the last surviving personal annuitant will pass as on an intestacy to the next of kin and the heir at law.

My Lords, upon this construction of the will it is not now in dispute that the rule in *Saunders v. Vautier* (4) does not apply, the reason being that that rule has no operation unless all the persons who have any present or contingent interest in the property are sui juris and consent. That is not the case here as regards all the persons who have rights as next of kin to a share in the released income. There is therefore no legal right in the Congregational Union to stop the accumulations, even if due provision be made for the annuities and the legacies payable on the death of the last personal annuitant. The interests of annuitants as such could no doubt be provided for in the usual way: *Harbin v. Masterman*. (5) The real difficulty in this case is that the residuary legatees have no right to the released income.

(1) (1838) 2 Keen 276.

(2) (1844) 14 Sim. 165.

(3) (1859) 4 De G. & J. 179.

(4) 4 Beav. 115.

(5) [1896] 1 Ch. 351, 361.

The appellants alternatively contend that the Court has a discretion to stop the accumulations and to permit the Congregational Union to have immediate enjoyment of the property subject to making proper provision for the annuitants. This would have the effect of destroying the interests of the heir-at-law and next of kin in the released income, or, in other words, of accelerating the vesting in possession of the residue at the expense of those persons. There is no authority for the interference of the Court in such a manner, and it seems to be clear that it could not be justified in principle. Persons who take on an intestacy have just as much claim to be protected in an administration by the Court as persons who are legatees. It may be tested in this way: Suppose the testator had directed that the surplus income of his residuary estate should be accumulated for twenty-one years from his death, and had disposed of the residue upon and not earlier than the death of a number of annuitants. Would it be possible to argue that the Court by an exercise of discretion could properly deprive the persons entitled on intestacy to the undisposed of income? Yet the present position is precisely the same from the point of view of the Court's discretionary powers.

My Lords, it was attempted by the appellants to support their contention by a reference to the decision of this House in *Wharton v. Masterman*. (1) It is true that an accumulation of residue was directed by the testator in that case for a period beyond that permitted by the Thellusson Act, namely, till the death of the last of several annuitants, some of whom were still alive though the legal period had come to an end. The residuary legatees were charities, and it was held by this House that their interests were vested and indefeasible, and that they were entitled year by year to have the surplus income handed over to them. It is argued that the rights of the next of kin and heir-at-law of the testator to the released income were thus defeated; and your Lordships were invited to follow that decision. There was, however, a vital difference between that case and the present one. The will of Mr. Duncan in the former case contained express clauses

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(1) [1895] A. C. 186.

H. L. (E.) preventing the annuitants from having a deficiency of income in any year made good in any other year. If there was a deficiency the annuities had to abate. It was thus clear that when the period of distribution of the estate arrived according to the terms of the will the residuary legatees were entitled to the whole of the capital of the residue undiminished by any claims of the annuitants. Under those circumstances there was, it is true, a direction to accumulate, but not an effective one, since the residuary legatees were absolutely entitled under the rule in *Saunders v. Vautier* (1) to the whole residuary estate subject only to the rights of the annuitants to be paid out of the yearly income. This House accordingly treated the case as one where the residuary estate was given absolutely to a person sui juris charged only with annuities payable out of income. Lord Herschell pointed out that in that case the Thellusson Act did not apply (2), the reason being that the rule in *Saunders v. Vautier* (1) was applicable. (See also the opinion of Lord Macnaghten. (3)) Lord Davey (4) pointed out that there was "no effective direction for "accumulation of any part of the surplus income . . . and "therefore the Thellusson Act has no application to it." In my opinion that is not the case here, where the rule in *Saunders v. Vautier* (1) is not applicable, but the Act as to accumulations is.

On these grounds I come to the conclusion that the judgments of Bennett J. and of the Court of Appeal were right. I also agree with the reasons given, except that I do not think it is necessary to base the decision on the fact that the residuary legatees are charities or to express any opinion as to the decision in *In re Deloitte*. (5) That authority, which turned on the refusal of the Court to presume a woman aged sixty-five to be past child-bearing for the purposes of the case, might require reconsideration in this House at some future time, and I think it better to leave open the questions which it involves. I am satisfied to rest the present matter

(1) 4 Beav. 115.

(2) [1898] A. C. 193.

(3) Ibid. 194.

(4) [1898] A. C. 200.

(5) [1926] Ch. 56.

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on principle, and to say, as the Court of Appeal held, that where there is a direction to accumulate income, effective according to the terms of the will, but in part illegal under the statute, the Court ought not in the exercise of its discretion to make an order the effect of which will be or may be to destroy or to prejudice the interests of other persons in the released income without the consent of such persons.

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My Lords, I think the appeal should be dismissed, but that in the circumstances of the case the costs of all parties as between solicitor and client should be directed to be paid out of the estate.

My Lords, I am authorized to say that my noble and learned friends, Lord Atkin and Lord Russell of Killowen, concur in the opinion which I have just delivered.

LORD THANKERTON. My Lords, I desire also to express my agreement with the opinion which has just been delivered.

LORD MACMILLAN. My Lords, I also concur.

Appeal dismissed.

Solicitors : *Shepheards, Walters & Bingley ; Church, Rendell, Bird & Co., for Woollcombe, Watts & Scrivener, Newton Abbot ; White & Leonard and Nicholls & Co., for W. Rackwood Cocks, Exeter ; H. W. Guthrie & Co. ; Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)* BERESFORD APPELLANT ;
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March 10, ROYAL INSURANCE COMPANY, }
11, 14, 15 ; LIMITED } RESPONDENTS.
May 9.

*Insurance (Life)—Suicide of assured while sane—Felony—Public policy—
Administratrix not entitled to recover policy money.*

The personal representative of a person, who, having insured his life, commits suicide while sane, cannot recover the policy moneys from the insurance company, for it would be contrary to public policy to assist a personal representative to recover the fruits of the crime committed by the assured. It makes no difference in law that the policy on its true construction binds the insurance company to pay in the event of the assured's suicide while sane, after the expiry of a year from the commencement of the insurance, for the Court will not enforce a provision which is illegal or contrary to public policy.
Northwestern Mutual Life Insurance Co. v. Johnson (1920)
254 U. S. Rep. 96 dissented from.
Decision of Court of Appeal [1937] 2 K. B. 197 affirmed.

APPEAL from a decision of the Court of Appeal. (1)

In 1925 Major Rowlandson took out a number of policies on his own life with the Royal Insurance Co., Ltd., for the sum of 50,000*l.* Each policy contained a condition in the following terms : “ If the life or any one of the lives assured (being also “the assured or one of them) shall die by his own hand, whether “sane or insane within one year from the commencement of “the assurance, the policy shall be void as against any person “claiming the amount hereby assured or any part thereof, “except that it shall remain in force to the extent to which a “bona fide interest for pecuniary consideration, or as a “security for money possessed or acquired by a third party “before the date of such death shall be established to the “satisfaction of the Directors.” In 1934 a premium having become due which the assured was unable to pay, he obtained extensions of the time for payment, the last of which ended at (1) [1937] 2 K. B. 197.

* *Present* : LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN,

3 P.M. on August 3, 1934. A few minutes before that hour the assured shot himself. Thereafter, the appellant, the assured's niece and administratrix, brought an action against the insurance company claiming the amount of the insurance, less certain sums which the assured had borrowed from the company.

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At the trial before Swift J. and a special jury certain questions were left to the jury which, with their answers, were as follows :

"Was Major Rowlandson at the time when he shot himself 'labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that 'he was doing what was wrong ? No."

"Was he, when he shot himself, possessed of that degree 'of physical, intellectual and moral control over his actions 'which a normal man would possess ? Yes."

Swift J., after hearing legal argument on the question whether in these circumstances the defendants were liable to pay the amount of the policy money, less the amount of the loans, gave judgment in favour of the plaintiff.

On appeal by the defendants, the Court of Appeal held that the personal representative of a person, who, having insured his life, commits suicide while sane, cannot recover the policy moneys, as it would be contrary to public policy to assist the personal representative to recover the fruits of the crime committed by the assured.

The plaintiff appealed to this House.

Sir William Jowitt K.C. and *A. T. Denning* for the appellant. In this case we start with the fact that the policy is indisputable, subject to this qualification, that, if the assured committed suicide within one year, it was to be avoided ; that obviously implies that, if the assured should commit suicide after one year, the policy would be good. In *Amicable Insurance Society v. Bolland* (1) it was decided by this House that it was against public policy to allow recovery on a policy on the life of

H. L. (E.) an assured who was convicted of, and executed for, felony.

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After that decision insurance companies introduced provisions into their policies as to what should happen in the event of the assured committing suicide, and consequently cases thereafter turned on the construction of these clauses. It must be borne in mind also that what is considered to be against public policy at one time may not be so regarded at another period. Moreover, there is a world of difference between such a case as this and one where a man murders another in order to benefit by his death. In *Cook v. Black* (1) a debtor effected an insurance on his life, one of the conditions being that, if the policy should be assigned bona fide, the assignee should have the benefit of it so far as his interest extended, notwithstanding that the assured should commit suicide. The assured committed suicide. It was held that the deposit of the policy and the agreement to assign it as security for a debt was valid as between the parties and was effective against the insurers. Neither the insurance company nor the Court took the point that the policy was invalidated by the assured committing suicide, the sole question debated being whether there was a good assignment. If the point now suggested against the validity of the policy is good, it is strange that it was not taken by counsel in the case or by Wigram V.-C. In *Borradaile v. Hunter* (2) the policy contained a proviso that "in case the assured should die by his own hands, or by the hands of justice or in consequence of a duel" it should be avoided, and it was held by the Court of Common Pleas (Tindal C.J. dissenting) that the policy was avoided where the assured threw himself into the Thames and was drowned, he at the time not being capable of judging between right and wrong. In the report of that case the provisions as to avoiding policies in case of suicide in use by a large number of insurance companies are set out, and it appeared to be assumed by every one that it was a matter upon which the parties might make what provisions they chose. Again, there is no trace of an argument in that case that it was against public policy to allow the recovery of the policy money where the assured had committed

(1) (1842) 1 Hare, 390.

(2) (1843) 5 Man. & G. 639.

suicide. In *Clift v. Schwabe* (1), where the policy contained a clause that it should become void if the assured "should commit suicide, or die by duelling or the hands of justice," Wightman J. said (2): "I forbear to speculate upon the probable object of the insurers in introducing such a proviso. . . . It may be that the exception in case of suicide was introduced to meet the case of a person insuring his life with the intention of committing suicide, in order to benefit his family; or, it may be that the insurers were influenced by some higher motive, and wished to check such modes of death as those excepted." That, again, as also does the judgment of Patteson J. in the same case, show that the Court considered that it was entirely a matter for the parties to arrange inter se. *Moore v. Woolsey* (3) is nearer the present case inasmuch as there was some discussion in it as to public policy. There the policy contained a clause that "if a person, who shall have been assured upon his own life for at least five years . . . shall die by his own hands, the directors shall be at liberty, if they think proper so to do, but not otherwise, to pay, for the benefit of his family, any sum not exceeding what the company would have paid for the purchase of his interest in the policy if it had been surrendered on the day previous to his decease; provided the interest in such assurance shall be in the assured, or in a trustee for him, or for his wife or children, at the time of his decease." There Lord Campbell C.J. said this (4): "When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee." In *Dufaur v. Professional Life Assurance Co.* (5) the policy was to become void if the assured should "commit suicide." The

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(1) (1846) 3 C. B. 437.

(2) Ibid. 460.

(3) (1854) 4 E. & B. 243.

(4) 4 E. & B. 255.

(5) (1858) 25 Beav. 599.

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assured, after assigning the policy, hanged himself while of unsound mind. It was held that the policy was not avoided as against the assignee. There again the question was one of pure construction, as it was likewise in *Jones v. Consolidated Investment Assurance Co.* (1) In *Jackson v. Forster* (2), Cockburn C.J., dealing with a policy containing the clause "this policy will "be void if the life assured die by his own hands, the hands "of justice, by duelling, or by suicide, but if any third party "have acquired a bona fide interest therein by assignment or "by legal or equitable lien for a valuable consideration, or as "security for money, the assurance . . . shall, nevertheless, "to the extent of such interest, be valid and of full effect," said that it might be taken for granted that the reason why insurance companies stipulated in these terms was because they insured upon the calculation of the average duration of human life. Were it not for this clause a person might insure for the benefit of those who come after him, intending all the time to put an end to his life. On the other hand, if policies were liable to be defeated by such a death under every state of things, one great inducement to persons to insure, namely, the possibility of disposing of their policies if expedient, would be taken away. Therefore, as the Chief Justice proceeded to say, a sort of compromise had been made. In *Cleaver v. Mutual Reserve Fund Life Association* (3) Fry L.J. said that the rule of public policy should be applied so as to exclude from benefit the criminal and all who claim under him, but not so as to exclude alternative or independent rights. That preserves in this case the right of the administratrix. Can it be said in such a case as this that the administratrix is claiming under the deceased, or has she a right of her own? We submit that she brings this action in her own and not by a derivative right. This can be tested first by a consideration of the question of costs. The statute 23 Henry 8, c. 15, provided that if any person commenced an action and after appearance by the defendant was nonsuited, the defendant should have judgment for costs. A question then arose as to the position of a person who sued as

(1) (1858) 26 Beav. 256.

(2) (1859) 29 L. J. (Q. B.) 8.

(3) [1892] 1 Q. B. 147.

executor, and it was held that if the cause of action arose after the death of the deceased the executor was liable for costs, and even if he described himself as executor that was held to be mere surplusage; he had brought the action in his own right: *Worfield v. Worfield* (1); *Jenkins v. Plombe* (2); *Shipman v. Thompson* (3); *Bollard v. Spencer*. (4) Further, the rule as to set-off shows that the administratrix is suing in her own right: *Rees v. Watts* (5); Williams on Executors, 12th ed., vol. 2, p. 1230, as also does the rule as to forfeiture: *Cranmer's Case*. (6) Again, it should be remembered that originally if a man died intestate all his goods went to the Crown and later to the Ordinary, but by 31 Edw. 3, stat. I., c. II., the right was given to the administrator to bring an action in respect of debt due to the deceased as if he had been appointed executor. In *Burger v. South African Mutual Life Insurance Society* (7), where a policy provided that in case "it shall not have become void" by the death of the assured by suicide, whether sane or insane, "within one year of the date hereof, [the said Society] will "pay to the executors, administrators or assigns of the assured, "the sum of 200*l*." After paying the premiums for ten years the assured went into rebellion and was killed in an engagement with British troops. It was held that the executors were entitled to recover the amount of the policy. In cases where death was caused by the driving of motor-cars at an excessive speed it was held that the policies were not avoided on the ground of public policy: see *Tinline v. White Cross Insurance Association* (8), and *James v. British General Insurance Co.* (9) It is true that in the later case of *Haseldine v. Hosken* (10) Scrutton and Greer L.JJ. reserved their opinion as to the correctness of those two decisions.

In the United States the tendency in recent years, differing in this from the earlier practice, has been to refuse to allow the defence of public policy in cases such as this: see *Whitfield v.*

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(1) (1627) Latch, 220.

(2) (1705) 6 Mod. 92.

(3) (1738) Willes, 103.

(4) (1797) 7 T. R. 358.

(5) (1855) 11 Ex. 410.

(6) (1573) 2 Leon. 5.

(7) (1903) 20 Sup. Ct. (Cape of Good Hope) 538.

(8) [1921] 3 K. B. 327.

(9) [1927] 2 K. B. 311.

(10) [1933] 1 K. B. 822.

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In the last cited case it was held that an incontestable clause in the policy barred the defence that the assured intended to commit suicide at the end of the contestable period. We submit that the limits of public policy on this subject are ill-defined and should not be held to apply to a case such as this.

[*Egerton v. Brownlow* (5); *Fender v. St. John-Mildmay* (6); and Professor Goodhart's article on Suicide and Life Insurance, 52 Law Quarterly Review, p. 575, were also referred to.]

Roland Oliver K.C., H. L. Murphy K.C., and E. Ryder Richardson for the respondents. The general principle is well established that the law will not assist a person to recover the fruits of his crime, particularly where the obtaining of those fruits was the very motive of the crime. Except for the judgment of Swift J. in the present case no English authority can be cited in favour of the appellant's claim. The legal position is correctly stated in Porter's Laws of Insurance, 8th ed., p. 125, as follows: "The insurer may take a risk "of death by any cause other than by sentence of law, self-destruction in a sane mind, or the consequences of some "criminal violation of law. If death ensue from any of these "causes, the insurer is not liable, since it is contrary to the "policy of the law in such case, to allow the insurance money "to be recovered," and for this proposition *Amicable Insurance Society v. Bolland* (7) and *Borrodaile v. Hunter* (8) are cited. Bunyon on Life Assurance, 5th ed., p. 83, states the law in the same way. The object of invoking public policy in such cases is to prevent a person reaping the fruits of his crime. In the motor cases cited on behalf of the appellant the death of the person concerned was accidental and the insurance was against accidents, and for that reason the policy could be sued upon; but the judgment of Scrutton L.J. in *Haseldine v. Hosken* (9), in

(1) (1906) 205 U. S. 489.

(2) (1920) 254 U. S. 96.

(3) (1924) 122 Southeastern Rep. 586.

(4) (1934) 72 Fed. Rep. (2nd series) 142.

(5) (1853) 4 H. L. C. 1, 106.

(6) [1938] A. C. 1.

(7) 4 Bligh N. S. 194.

(8) 5 Man. & G. 639.

(9) [1933] 1 K. B. 822.

which those cases were discussed, shows that an action to support a claim which is illegal and contrary to public policy is not maintainable. With reference to the decision in *Burger v. South African Mutual Life Insurance Society* (1), it should be noted that De Villiers C.J., after referring to *Amicable Insurance Society v. Bolland* (2), said that, if it was still binding, it would follow a fortiori that, if the deceased in the case with which he was dealing had met his death by suicide, the insurance company would have been justified in repudiating liability, notwithstanding the clause providing for the avoidance of the policy in the event of the suicide of the assured whether sane or insane within one year of the date of the policy.

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Sir William Jowitt K.C. in reply. The House ought not to draw any inference as to the motive of the deceased in committing suicide. The principle to be applied is freedom of contract, and as the insurance company agreed to pay the policy money if death by suicide occurred after one year they should be held to their obligation.

The House took time for consideration.

1938. May 9. LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal, who reversed a decision of the late Swift J. in favour of the plaintiff and entered judgment for the defendants. The action was brought by the administratrix with the will annexed of the estate of Charles Rowlandson to recover the sum of 50,000*l.* said to be due under five policies issued to him by the defendants. The only relevant defence pleaded was that the deceased died by his own hand, whereby the policies became void. It is unnecessary to state in detail the melancholy facts of the death of the assured, Major Rowlandson. It is sufficient to say that since June, 1925, he had been maintaining five policies on his life for 50,000*l.* in respect of which the premiums payable quarterly amounted to about 450*l.* In June, 1934, he was insolvent: he had borrowed over 60,000*l.*, over 40,000*l.* from personal friends, to finance an

(1) 20 Sup. Ct. (Cape of Good Hope) 538.

(2) 4 Bligh N. S. 194.

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invention for hardening steel, which had been unsuccessful. In addition he had borrowed from the respondents on the security of the policies the sum of 6791*l*. The policies at this date had no surrender value above the amount advanced : and he was unable to pay the premium. At a series of interviews with the representative of the defendants he obtained extensions of time for payment of the premium : the last and final extension was to 3 P.M. on August 3. At about 2.57 P.M. on that day he shot himself. Letters and interviews on that day made it clear that he shot himself for the purpose of the policy moneys being made available for the payment of his debts. The action was tried by Swift J. and a special jury. The jury, by consent of counsel, were only asked to decide the question whether the assured was sane when he took his life. They answered this question in the affirmative. A question had been raised at the trial as to whether the test of insanity in such a case was the well known test negating criminal responsibility or was something different. The jury negated insanity in either of the forms put to them : and the question is no longer relevant in these proceedings. Though the defendants had not pleaded public policy, they raised that contention in the course of argument. It was in any case in my opinion a matter which the judge would be bound to discuss and determine on his own initiative. Swift J. came to the conclusion that the rules of public policy did not prevent the plaintiff from recovering, and entered judgment for the plaintiff. The Court of Appeal held that it was contrary to public policy for the plaintiff to be entitled to enforce the contract and entered judgment for the defendants.

In discussing the important subject of the effect of suicide on policies of life insurance it is necessary to distinguish between two different questions that are apt to be confused : (1.) What was the contract made by the parties ? (2.) How is that contract affected by public policy ?

(1.) On the first question, if there is no express reference to suicide in the policy, two results follow. In the first place intentional suicide by a man of sound mind, which I will call sane suicide, ignoring the important question of the test of

sanity, will prevent the representatives of the assured from recovering. On ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he intentionally burns down his house, nor the marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life. This is not the result of public policy, but of the correct construction of the contract. In the second place this doctrine obviously does not apply to insane suicide, if one premises that the insanity in question prevents the act from being in law the act of the assured.

On the other hand, the contract may and often does expressly deal with the event of suicide : and that whether sane or insane. It may provide that death arising at any time from suicide of either class is not covered by the policy. It may make the same stipulation in respect of suicide of either or both classes happening within a limited time from the inception of the policy. The rights given to the parties by the contract must be ascertained according to the ordinary rules of construction : and it is only after such ascertainment that the question of public policy arises. In the present case the contract contained in the policy provided that the company would pay the sum assured to the person or persons to whom the same is payable upon proof of the happening of the event on which the sum assured was to become payable. It further provided that the policy was subject to the conditions and privileges endorsed so far as applicable. It contained the further stipulation that unless it was otherwise provided in the schedule the policy, subject to the endorsed conditions, was indisputable. The schedule specified the assured as Charles Rowlandson, the life assured as the assured, the event on the happening of which the sum was to become payable as the death of the life assured, and the person or persons to whom the sum was payable as the executors, administrators or assigns of the assured. The only relevant condition is condition 4, which reads as follows : "If the life or any one of the lives assured (being also the "assured or one of them) shall die by his own hand, whether

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 1938 "the assurance, the policy shall be void as against any person
 BERESFORD "claiming the amount hereby assured or any part thereof,
 v. "except that it shall remain in force to the extent to which a
 ROYAL "bona fide interest for pecuniary consideration, or as a security
 INSURANCE "for money, possessed or acquired by a third party before the
 Co. "date of such death, shall be established to the satisfaction of
 Lord Atkin. "the Directors."

My Lords, I entertain no doubt that on the true construction of this contract the insurance company have agreed with the assured to pay to his executors or assigns on his death the sum assured if he dies by his own hand whether sane or insane after the expiration of one year from the commencement of the assurance. The express protection limited to one year, and the clause as to the policy being indisputable subject to that limited exception seem to make this conclusion inevitable. The respondents' counsel appeared shocked that it should be considered that a reputable company could have intended to make such a contract : but the meaning is clear : and one may assume from what one knows of tariff conditions that it is a usual clause. There is no doubt therefore that on the proper construction of this contract the insurance company promised Major Rowlandson that if he in full possession of his senses intentionally killed himself they would pay his executors or assigns the sum assured.

(2.) The contract between the parties has thus been ascertained. There now arises the question whether such a contract is enforceable in a court of law. In my opinion it is not enforceable. The principle is stated in the judgment of Fry L.J. in *Cleaver v. Mutual Reserve Fund Life Association* (1) : "It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." The cases establishing this doctrine have been fully discussed by Lord Wright M.R. in his judgment in the present case. I mention some of them in order to call attention to the fact that, while in the earlier cases different

(1) [1892] 1 Q. B. 147, 156.

reasons have been given for the rule, the principle can now be expressed in very general terms. In *Fauntleroy's* case, *Amicable Insurance Society v. Bolland* (1), the Lord Chancellor refused to allow the assignees of a bankrupt who had committed forgery to recover the proceeds of a life insurance taken out by the forger who had been convicted and executed. "Is it not void "upon the plainest principles of public policy? Would not "such a contract (if available) take away one of those restraints "operating on the minds of men against the commission of "crimes, namely, the interest we have in the welfare and "prosperity of our connexions?" It may be of interest to note with regard to this famous case that Lord Lyndhurst had as Attorney-General been leader for the prosecution at the trial of Fauntleroy. In this case the ground given is the removal of a restraint against the commission of crime. In *Moore v. Woolsey* (2) the Court of Queen's Bench refused to hold void a condition that a policy on the life of a person who should die by his own hands would remain in force to the extent of any bona fide interest acquired as security for money. The assured had died by his own hand, but whether sane or insane did not appear. Lord Campbell, in deciding for the plaintiff, said that a stipulation that if a man committed suicide within a year the policy should give a right of action would be void. He appears to put it on the ground that it would offer an encouragement to suicide. In *Cleaver's* case (3) the executors of James Maybrick were suing on a life policy which he had effected in favour of his wife, who had been convicted of his murder. The objection that the executors were suing to enforce a trust in favour of the wife was got over by holding that the wife could get no benefit from her crime, but that, her interest failing, the executors could recover for the benefit of the testator's estate. It should be noticed that on the principle stated it is not a question of refusing to enforce a contract made by the criminal: the doctrine avoids a testamentary gift: and it would appear to be immaterial whether the criminal knows or not of the intended gift. If he does not

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(1) 4 Bligh N. S. 194, 211.

(3) [1892] 1 Q. B. 147.

(2) 4 E. & B. 243.

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know, the inducement to commit the crime and the removal of the restraint against committing the crime both tend to disappear as supports for the doctrine. In *Crippen's* case (1), the question arose as to whether administration of the estate of a deceased wife who had been murdered by her husband should be granted to the next of kin of the wife passing over the legal personal representative of the husband. The President, Sir Samuel Evans, decided in favour of the wife's next of kin and said (2): "It is clear that the law is, that no person can "obtain, or enforce, any rights resulting to him from his own "crime; neither can his representative, claiming under him, "obtain or enforce any such rights. The human mind revolts "at the very idea that any other doctrine could be possible in "our system of jurisprudence." Finally, in *Hall v. Knight and Baxter* (3), the Court decided that a woman who had killed a testator in circumstances that amounted to manslaughter, but not, it would appear, manslaughter by negligence, could not be allowed to claim probate as a legatee under the will of the testator. Swinfen Eady L.J. said (4): "The estate of the "testator must go in the same way as if there were no benefit "given to Jean Baxter by the will and that she cannot in any "way benefit from the crime which she has committed. I "see no reason for restricting the rule to cases of murder." Lord Sumner, then Hamilton L.J., said (5): "The principle "can only be expressed in that wide form. It is that a man "shall not slay his benefactor and thereby take his bounty." It may be remarked that this pithy statement, while applicable to the case under discussion, is not as wide as the principle permits. It would not be apt to decide a claim under a contract where the criminal may have given full consideration, and could hardly be said to be "taking bounty from a "benefactor." I think that the principle is that a man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether under a contract or a gift. No doubt the rule pays regard to the fact that to

(1) [1911] P. 108.

(2) Ibid. 112.

(3) [1914] P. 1.

(4) [1914] P. 8.

(5) Ibid. 7.

hold otherwise would in some cases offer an inducement to crime or remove a restraint to crime, and that its effect is to act as a deterrent to crime. But apart from these considerations the absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime.

The application of this principle to the present case is not difficult. Deliberate suicide, *felo de se*, is and always has been regarded in English law as a crime, though by the very nature of it the offender escapes personal punishment. Indeed, Sir John Jervis, in his first edition of his book on the office and duties of coroners, said: "Self murder is wisely and "religiously considered by the English law as the most "heinous description of felonious homicide." The coroner's inquisition, as Lord Wright pointed out, formerly recorded "felonice se murderavit", is now (Coroners' Rules, 1927) "the said C.D. did feloniously kill himself." The suicide is a felon: on the inquisition his goods were forfeited (though apparently not his lands). By English law a survivor who had agreed with him to commit suicide with him is guilty of murder: and the attempt to commit suicide is an attempt to commit a felony and punishable accordingly: *Rex v. Mann*. (1) The remaining question is whether the principle applies where the criminal is dead and his personal representative is seeking to recover a benefit which only takes shape after his death. It must be remembered that the money becomes due, if at all, under an agreement made by the deceased during his life for the express purpose of benefiting his estate after his death. During his life he had power of complete testamentary disposition over it. I cannot think the principle of public policy to be so narrow as not to include the increase of the criminal's estate amongst the benefits which he is deprived of by his crime. His executor or administrator claims as his representative, and, as his representative, falls under the same ban.

Anxiety is naturally aroused by the thought that this principle may be invoked so as to destroy the security given to lenders and others by policies of life insurance which are in

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daily use for that purpose. The question does not directly arise, and I do not think that anything said in this case can be authoritative. But I consider myself free to say that I cannot see that there is any objection to an assignee for value before the suicide enforcing a policy which contains an express promise to pay upon sane suicide, at any rate so far as the payment is to extend to the actual interest of the assignee. It is plain that a lender may himself insure the life of the borrower against sane suicide; and the assignee of the policy is in a similar position so far as public policy is concerned. I have little doubt that after this decision the life companies will frame a clause which is unobjectionable: and they will have the support of the decision of the Court of Queen's Bench in *Moore v. Woolsey* (1), where a clause protecting bona fide interests was upheld. It was suggested to us that so far as the doctrine was applied to contracts it would have the effect of making the whole contract illegal. I think that the simple answer is that this is a contract to pay on an event which may happen from many causes, one only of which involves a crime by the assured. The cause is severable and the contract, apart from the criminal cause, is perfectly valid.

I do not deal with the United States cases which have been discussed sufficiently by Lord Wright. I attach much importance to uniformity of result in the Courts of the two countries in matters of such strong mutual interest as the law of insurance. But questions of public policy must develop nationally: and it would be unreasonable to expect identity of outlook in the Courts of all countries. I cannot forbear, however, to mention the case of *Northwestern Mutual Life Insurance Co. v. Johnson* (2), for the reason that the judgment was given by Holmes J., a name always to be received with veneration by an English lawyer. The decision seems to me contrary to the general trend of United States decisions up to its date: and seems only to be applicable where a rule of public policy of the State whose law is the proper law governing the insurance policy cannot be ascertained. It contains no discussion of the rule of public policy that could

(1) 4 E. & B. 243.

(2) 254 U. S. 96.

be applied except that the promise to pay may evoke a possible motive for self slaughter. In reference to such a ground the judgment points out that the motive is no stronger than the motive for murder where an insurance is taken out on the life of a third party. From that point of view I think that the criticism is just : and I am glad to find support in it for the view I recently expressed in *Fender v. St. John-Mildmay* (1), where I suggested that for tendency to play a part in public policy it must be in a case where the parties generally or in a considerable number of cases will be exposed to a real temptation and it is likely that they will yield to it. But, as has already been pointed out in this opinion, the principle of public policy applied in these Courts goes far beyond the supposed motive for self slaughter. For the reason I have given I think that this contract is in the circumstances unenforceable. I agree with the judgment of the Court of Appeal, and am of opinion that this appeal should be be dismissed with costs.

My Lords, I am asked to say that my noble and learned friend Lord Thankerton agrees with the opinion which I have just expressed.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

LORD MACMILLAN. My Lords, the respondent insurance company issued to the late Major Rowlandson a series of life policies whereby, in consideration of the payment by him of the stipulated premiums, they undertook to pay certain sums of money to his executors, administrators or assigns in the event of his death. Each policy was declared, subject to the endorsed conditions, to be indisputable. The fourth endorsed condition is the only one material for the present purpose. I need not set it out as it has just been read by my noble and learned friend on the Woolsack.

The stipulated premiums were paid for a number of years by the assured till, on August 3, 1934, the event, on the occurrence of which the respondents had undertaken to

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H. L. (E.) make payment—namely, the death of the assured—took place.
 1938 Inasmuch as his death did not occur within one year from the
 BERESFORD commencement of the assurance, the fourth condition of the
 v. policy is inapplicable, and it is not suggested that any other
 ROYAL condition avoiding or affecting the respondents' liability
 INSURANCE applies. The respondents are accordingly by the terms of
 Co. their contracts incontestably under obligation to pay the
 Lord Macmillan. policy moneys to the appellant, as the assured's administratrix,
 under deduction of certain sums advanced by the respondents
 to the assured.

The respondents, however, maintain that it would be contrary to public policy that a court of law should order them to fulfil their contracts, on the ground that the assured, as is the fact, died by his own hand while sane.

My Lords, on the question of the construction of the contracts, I have no difficulty. If the policies had contained no reference at all to suicide, I should have been of opinion that they did not cover the contingency of the assured committing suicide while sane, or in other words that the event of the assured's death did not mean or include the event of his self-caused death while sane. But the policies do contain an express reference to the contingency of suicide in the fourth condition, which avoids the policies in the event of the assured dying by his own hand, whether sane or insane, within one year from the commencement of the assurance. This condition, as I read it, is a pregnant condition. Coupled with the declaration of indisputability, I think that it necessarily implies a positive undertaking to pay if the assured dies by his own hand, sane or insane, after the expiry of a year from the commencement of the assurance.

The question therefore is whether it is contrary to public policy for a court of law to enforce a contractual undertaking by an assurance company to pay a sum of money to an assured's representatives in the event of his dying by his own hand while sane after the expiry of a year from the commencement of the assurance.

My Lords, I confess that I have found this question a difficult one. I need not rehearse the emphatic reminders

contained in the speeches of the noble and learned Lords who were in the majority in the recent case of *Fender v. St. John-Mildmay* (1), on the subject of the dangers which attend the application of considerations of public policy to contracts deliberately undertaken by persons of full age. The first question must always be—what is the principle of public policy which would be infringed by the enforcement of the contract? In the present instance, the principle which, it is said, would be infringed is the principle that no Court ought to assist a criminal to derive benefit from his crime; it has also been put in this form—that no Court ought to enforce stipulations tending to induce the commission of a crime. That there are such principles of public policy to which the Courts ought to give effect, I do not doubt. But in the present case would the enforcement of the respondents' obligation enable a criminal to take benefit from his crime? Or can it be said that the obligation now sought to be enforced was one which held out an inducement to commit a crime, to wit, the crime of *felo de se*?

It was certainly not the desire or intention of the respondents in framing their policies as they did to offer any inducement to the commission of the crime of suicide. It was directly contrary to their interest that the assured should commit suicide and bring their obligation prematurely into operation. The respondents did not agree to pay the policy moneys in consideration of the assured committing suicide, which would plainly have been a *turpis causa*, but in consideration of the assured making payment of the stipulated premiums, and the longer he lived and paid these premiums the better for the respondents. The event of his suicide, although they undertook to pay on its occurrence, was certainly not an event which the respondents desired to induce the assured to bring about. By providing that they would not pay if the assured committed suicide within a year of the commencement of the assurance the respondents provided some safeguard against the assured taking out a policy with a view to suicide, for few suicides can be so provident as to

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Moreover, it is plain that the benefit of the crime, in the sense of receiving the policy moneys, could never be enjoyed by the assured, for it is a condition of the benefit that it shall not accrue till after his death. There is obviously much less inducement to commit a crime in order to benefit others than to commit it in order to benefit oneself. The instinct of self-preservation may be said to provide a stronger motive against suicide than the desire to benefit relatives or creditors can be said to provide a motive to commit suicide, though it was no doubt true in Major Rowlandson's case that the benefit to be derived by his creditors from his death influenced him in taking his own life. If the plea of public policy is sustained in this case, the remarkable result will ensue that the respondents who are said to have provided the assured with the inducement to commit a crime will be the only persons to benefit by its commission for they will retain the premiums paid by the assured without any liability to fulfil the obligation in consideration of which they received them.

There may truly be said to be a conflict of principles of public policy involved, for it is undeniably a principle of public policy that persons who enter into contractual engagements should be required to fulfil them. It is of the first importance, in particular, that policies of life assurance, which are among the most useful instruments of credit, should not be subject to any contingent invalidity, and the present form of clause was no doubt adopted by the respondents, an eminently reputable company, and presumably by other equally reputable companies, solely with a view to rendering their policies attractive by reason of their stipulated incontestability.

Finally, there is the decision of the Supreme Court of the United States in *Northwestern Mutual Life Co. v. Johnson* (1) where payment was enforced in the case of a suicide under a policy containing a clause practically the same as the present clause and the view that it was contrary to public policy to do so was negatived, a decision all the more striking in that it

was contrary to the view previously entertained by that eminent Court. H. L. (E.)

My Lords, I have accumulated these considerations in justification of the difficulty which I have experienced in concurring with your Lordships, and it is perhaps as well that I should have done so in order that it may not be thought that any of them have been overlooked. But, after carefully weighing them, I do not find them, cogent as they are, sufficiently convincing to deter me from agreeing with your Lordships' conclusion. I need not repeat the considerations leading to that conclusion which have been so fully developed by my noble and learned friend on the woolsack and also in the Court of Appeal. I feel the force of the view that to increase the estate which a criminal leaves behind him is to benefit him. To enforce payment in favour of the assured's representative would be to give him a benefit, albeit in a sense a post-mortem benefit, the benefit, namely, of having by his last and criminal act provided for his relatives or creditors. And no criminal can be allowed to benefit in any way by his crime.

I return to the simple question—ought the Courts to enforce a contract to pay a sum of money to a person's representatives in the event of his committing *felo de se*? In my opinion I am bound to answer this question in the negative, both on principle and, so far as the Courts of this country are concerned, by authority. I should add that I desire to reserve my opinion as to the position of third parties who have bona fide acquired rights for value under such policies.

Appeal dismissed.

Solicitors for appellant : *Soames, Edwards & Jones.*

Solicitors for respondents : *Sutton, Ommanney & Oliver.*

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May 9.			

Master and servant—Four workmen killed in railway accident—Widows' claims for damages under Employers' Liability Act, 1880—Children's claims for compensation under Workmen's Compensation Act, 1925—Computation of damages and compensation—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), ss. 2, 3, 4—Fatal Accidents Act Amendment Act, 1864 (27 & 28 Vict. c. 95), s. 1—Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), ss. 1, 3—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), ss. 8, 29.

In respect of an accident, in which four workmen in the employment of the respondent railway company were killed, proceedings were brought against the company by each of the respective widows claiming damages under the Fatal Accidents Acts, 1846 and 1864, and the Employers' Liability Act, 1880, and proceedings claiming compensation under the Workmen's Compensation Act, 1925, were brought by the children of each of the four workmen. The county court judge awarded damages under the Acts of 1846 and 1864 to each of the four widows, without taking into account any loss suffered by the children; and similarly, in awarding compensation to the children as dependants he disregarded the fact that the widows had recovered damages:—

Held, that in assessing the damages recoverable by the widows in the actions brought by them the county court judge was right to ignore the fact that the children were claiming compensation in respect of the same accident under the Workmen's Compensation Act; and similarly, in respect of the claims by the children to compensation he was right to ignore the fact that the widows were claiming damages.

Decision of Court of Appeal [1937] 2 K. B. 515 reversed.

APPEAL from a decision of the Court of Appeal. (1)

On January 19, 1936, four workmen in the employment of the London & North Eastern Railway Company were killed in a collision near Grantham while engaged on their work for the company. As a result proceedings were brought in the Grantham County Court, four actions by the respective widows

(1) [1937] 2 K. B. 515.

* *Present* : LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

claiming damages under the Fatal Accidents Acts, 1846 and 1864, and the Employers' Liability Act, 1880, and four arbitration proceedings by the children of the four workmen, claiming compensation under the Workmen's Compensation Act, 1925, as dependants.

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It was objected by the railway company that both sets of proceedings were not maintainable, and questions were also raised, in case the above contention failed, as to the mode of computing the damages and compensation.

The Employers' Liability Act, 1880, s. 1, gave the right to claim damages under the Fatal Accidents Acts when the fatal accident was due to the negligence of a workman in the same employment as the deceased, and such negligence was found by the county court judge. Sect. 3 of the Act limited the amount of damages recoverable. Under the Fatal Accidents Act, 1846, s. 2, actions brought thereunder were to be for the benefit of the wife, husband, parent and child of the deceased person, and the Fatal Accidents Act, 1864, s. 1, enabled the proceedings to be brought by one or more of these persons in certain cases.

The county court judge held that the separate proceedings were maintainable notwithstanding the provisions of s. 2 of the Act of 1846 and s. 29 of the Workmen's Compensation Act, 1925, and accordingly he awarded damages under the Acts of 1846 and 1864 to each of the widows without taking into account any loss suffered by the children, and in some cases he gave the widows the maximum sum permitted by the Act of 1880. Similarly, in awarding compensation to the children as dependants he disregarded the fact that the widows were also dependants and had recovered damages.

On appeal by the railway company, the Court of Appeal held that when a workman meets with a fatal accident in the course of his employment by reason of the negligence of a fellow workman so as to bring the case within s. 1 of the Employers' Liability Act, 1880, the widow can elect to maintain proceedings for damages under the Act of 1880, and the children can elect to maintain proceedings for compensation as dependants of the deceased workman under the

H. L. (E.) Workmen's Compensation Act, 1925, but if they have so
 1938 elected, since the widow's proceedings must by virtue of s. 2
 AVERY of the Fatal Accidents Act, 1846, be taken to have been
 v. brought for the benefit of herself and her children, she can
 L. & N. E. only receive her proper share of the total damages as they
 Ry. Co. are restricted by s. 3 of the Act of 1880; and so, too, as
 each widow was the dependant of the deceased workman, the
 children could only receive their proper share of the lump
 sum assessed as compensation for all the dependants under
 the Act of 1925.

The plaintiffs and claimants appealed to this House.

Sir William Jowitt K.C., Lynskey K.C., and W. Shakespeare
 for the appellants. The Court of Appeal was wrong in holding
 that the action brought by the widow must be taken to have
 been brought on behalf of herself and her children so that
 each recovered in that action a share of the amount assessed
 as damages. We submit that the widow was entitled to bring
 the action under Lord Campbell's Act on her own behalf
 and for her own benefit, and, similarly, the children were
 entitled to claim under the Workmen's Compensation Act
 and to have their compensation assessed thereunder regardless
 of the fact that the widow claimed and recovered under Lord
 Campbell's Act. In *Gill v. Fortescue & Sons* (1) Cozens-
 Hardy M.R. said (2): "The widow was not a claimant, and
 "she was not awarded compensation. She might, I assume,
 "if she had been so minded, have made a claim as a dependant,
 "but she did not. And to say that the children, who do
 "claim as dependants, are not entitled to all the sum awarded
 "because one member of the class of dependants decided to
 "stand out and rely on Lord Campbell's Act, seems to be
 "an impossible contention. The dependants who obtained
 "an award as plaintiffs, cannot be prejudiced by the fact
 "that another person who might have become a co-plaintiff,
 "has refused to do so." That is precisely in point in this
 case. The option to claim given by s. 29 of the Workmen's
 Compensation Act, 1925, is an individual option; each

(1) (1913) 6 B. W. C. C. 577.

(2) *Ibid.* 581.

dependant must decide for himself what remedy he will pursue, and the claim of any one dependant cannot be adversely affected by the remedy another dependant has elected to adopt: *Kinneil Cannel and Coking Coal Co. v. Waddell*. (1) The family left by the deceased workman is not to be looked at as a whole; it is the individual members who have to be regarded: *Pym v. Great Northern Ry. Co.* (2) In *Blain v. Greenock Foundry Co.* (3) it was decided by the Court of Session that the persons entitled to benefit under the Workmen's Compensation Act are those who have not otherwise received compensation.

Schiller K.C. and *Beney* for the respondents. The root of this discussion lies in the correct interpretation of Lord Campbell's Act. Before that Act no action was maintainable in respect of the death of a human being; but that Act gave such a right of action to a limited class, which action was to be brought for the benefit of that class, so that any one who had a claim but stood out was excluded from the right to share in the damages awarded. By the Employers' Liability Act, 1880, a workman was for the first time placed in the same position for claiming compensation as a stranger was by Lord Campbell's Act, with, as we contend, the same consequences. The Workmen's Compensation Act and the remedies thereunder are not based on the Employers' Liability Act, and what is to be looked at is the position of the workman and his dependants at the date of his death. The lump sum awarded under the Workmen's Compensation Act is to be for the benefit of the deceased's dependants, that is, his widow, if there is one, and his children. In *Miller v. Canada Grand Trunk Ry.* (4) Lord Davey, speaking of the Civil Code of Quebec there in question, said (5) "that the right of action of the widow and relatives under this article is an independent and personal right of action, and not, as in the English Act known as Lord Campbell's Act, conferred on the representatives of the deceased only."

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(1) [1931] A. C. 575.

(2) (1863) 4 B. & S. 396.

(3) (1903) 5 F. 893.

(4) [1906] A. C. 187.

(5) Ibid. 191.

H. L. (E.) Here the widow has exercised her option to sue under Lord Campbell's Act, and must be taken to have brought it in her representative capacity, that is for all those entitled to recover in respect of the death of the deceased—herself and the children—and whatever was awarded under that Act must be taken to have been awarded for the benefit of all who suffered by the death, and that sum should have been apportioned between the widow and children. The claims under the Workmen's Compensation Act should therefore have been dismissed.

Sir William Jowitt K.C. replied.

[*Page v. Burtwell* (1) and *Codling v. John Mowlem & Co.* (2) were also referred to.]

The House took time for consideration.

1938. May 9. LORD MAUGHAM L.C. (read by LORD ATKIN). My Lords, this appeal is one of considerable difficulty and importance; and I was engaged in preparing an opinion designed to show my reasons for being obliged to differ from the Court of Appeal when I was enabled to peruse the judgment prepared by my noble and learned friend Lord Atkin. That opinion so completely coincides with my own that, without intending any disrespect to the Court of Appeal, I do not feel justified in taking up the time of your Lordships in expressing, perhaps in language not so clear and precise, my own views. In these circumstances I shall content myself by saying that I agree in all respects in the opinion of my noble and learned friend.

LORD ATKIN. My Lords, this is an appeal from an order of the Court of Appeal who set aside judgments and awards of His Honour Judge Langman in proceedings in the County Court of Lincolnshire, holden at Grantham: and directed new trials. The proceedings all arose out of the same accident in which four workmen, servants of the respondent railway company, were killed. They were being carried in the course

(1) [1908] 2 K. B. 758.

(2) [1914] 3 K. B. 1055.

of their employment in a ballast train which was run into by two light engines negligently driven by servants of the railway company. The case therefore came within s. 1, sub-s. 5, of the Employers' Liability Act, 1880, which provides that where personal injury is caused to a workman, "(5.) By "reason of the negligence of any person in the service of the "employer who has the charge or control of any "locomotive engine upon a railway, the workman, or "in case the injury results in death, the legal personal representatives of the workman and any person entitled in case "of death, shall have the same right of compensation and "remedies against the employer as if the workman had not "been a workman of nor in the service of the employer nor "engaged in his work." The result was that the widows and children of the respective workmen had the rights of compensation and remedies given to them by the Fatal Accidents Acts, 1846 and 1864, the first of which is generally known as Lord Campbell's Act, and also had the rights of compensation given to them by the Workmen's Compensation Act. But under s. 29, sub-s. 1, of that Act the workman (and by s. 48, sub-s. 3, this includes his dependants) has only an option to claim under the Act or to take proceedings independently of the Act. The option, however, is one to be exercised by each individual claimant: *Kinneil Cannel Co. v. Waddell*. (1) If proceedings are taken by virtue of the Employers' Liability Act they are subject to a limit to the amount of compensation recoverable under the Act which by s. 3 is not to exceed a sum equivalent to three years' earnings of a person in similar conditions to the injured workmen. The limit under the Workmen's Compensation Act is arrived at on similar principles, but may be rather larger. In the present cases the widows and children, acting no doubt under the advice of the workmen's trade union, adopted a uniform policy. The widows made a claim under the Employers' Liability Act, the children claimed as dependants, total or partial, under the Workmen's Compensation Act. The county court judge therefore had before him four actions in which the widows were plaintiffs:

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and four arbitration proceedings in which the children were applicants. In the actions he assessed the damages to two of the widow plaintiffs at the full amount of the maximum sum, and to two of the plaintiffs at something less than the maximum sum. In assessing the damages he refused to take into account that there were other dependants, the children, who were not claiming in the actions. In the arbitration proceedings he awarded to the applicant children compensation either for total or partial dependency. In no case did he award the maximum under the Act, but in each case he declined to take into consideration the fact that there was another dependant, the mother, who was not in fact applying for compensation under that Act. The Court of Appeal have held that the judge was wrong. As I understand their judgment it is that both the Employers' Liability Act and the Workmen's Compensation Act provide a limited compensation for a group of injured dependants. The compensation in both Acts must be awarded as though all the injured group were before the Court, and no one member is to get more compensation than he or she would have got if compensation were being assessed for all. You could not therefore award the total maximum to a mother if there were in fact children dependants, but only her fair share in the family group. Similarly in workmen's compensation proceedings you could not distribute the total maximum among the children applicants, as the mother's share is outstanding. It is true that one or more claimants might renounce their share in favour of others: but that would only be on the footing that they had claimed their share and assigned it to the others: and, if that were done, they would be precluded under the option provision from claiming under the alternative proceeding.

My Lords, I am unable to agree with this construction of either Act. The question may be considered historically. If a claim were made under Lord Campbell's Act after 1846 it is manifest, I venture to think, that no question of group compensation arises. The action for damages, to which for the first time by s. 1 the tortfeasor is made liable, is by s. 2

expressed to be for the benefit of the wife, husband, parent and child of the person killed: the words "parent" and "child" are by s. 5 expanded to include grandparents and step-parents, grandchildren and step-children. But they obviously are not the group to whom compensation is to be awarded: they form the class injured, members of which may recover compensation: and the only proceeding in which such injured members may recover compensation is in an action brought for them and naming them, with an express statutory provision in s. 4 that with the declaration there must be delivered full particulars of the person for whom and on whose behalf the action is brought, and of the nature of the claim. The jury are to give damages proportionate to the injury to the parties respectively for whom and for whose benefit the action shall be brought; and the amount so recovered after deducting the costs not recovered—in the words of the Act—"shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict "shall find and direct."

The amount of the injury is a question of fact in each case, and when found the damages constitute a legal debt due to each of the persons to whom the jury have awarded damages. There is no room for consideration of a dependant not named and therefore not before the jury. The quantum of damages in such a case is not a proportion of a limited sum. It would not be different though one or more injured persons had not claimed. One action alone can be brought, and the persons who stand out stand out for ever. If they have been improperly excluded from the action by the representative plaintiffs they may, no doubt, before the verdict of the jury, apply to be named as parties to benefit; or, possibly, they may have some legal or equitable remedy against the representative plaintiffs. But after verdict they have no possible claim against the defendant. Nor can the defendant assert their existence to influence the jury's decision as to damages. The altruistic tortfeasor who says to the jury "the present persons "may have been injured: but I have injured others who "are not before you. They are not here and I cannot give

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 1938 “into account” has never yet appeared in the Courts in
 AVERY such an action.

^{v.}
 L. & N. E. The rights and liabilities under the Employers’ Liability
 Ry. Co. Act, 1880, appear to be precisely the same in this respect,
 Lord Atkin. with the exception that the compensation recoverable from
 the employer is subject to a statutory limit. The statute
 creates no special causes of action for either the workman,
 his representatives or his injured dependants. It provides
 that they shall have the same rights and remedies as they
 would have had but for the doctrine of common employment.
 In case of death this means at that time that their remedies
 are defined by the Fatal Accidents Acts. There can only be
 one action, the claimants must be named in the plaint: the
 jury or the judge must assess the damages for each party
 for whom and for whose benefit the action shall be brought,
 subject now to the statutory maximum. There is again no
 room for the dependant who is not in the above sense a party
 to the action.

No doubt, both in actions under Lord Campbell’s Act and
 under the Employers’ Liability Act a judge may interest
 himself to see whether there are other dependants outstanding
 and what are the reasons for their absence, and I can imagine
 that he might think fit to adjourn the proceedings for further
 inquiries to be made; but his jurisdiction is confined to
 assessing damages for the people in fact before him, and
 I can see no ground under the Employers’ Liability Act for
 assessing damages on any other footing than that he has
 only to consider the parties in fact before him. On the four
 actions, therefore, I come to the conclusion that the county
 court judge was correct in his procedure and that his judg-
 ments should not be disturbed.

The position under the Workmen’s Compensation Act
 seems to me to be identical with that with which I have been
 dealing. The Act in case of the death of a workman caused
 within its provisions gives a right to compensation to the
 dependent members of the workman’s family. The class
 from whom the dependants may come is larger than under

the Fatal Accidents Acts, as it includes brothers and sisters. Sect. 4 of the Workmen's Compensation Act seems to make the matter plain. The application under the Act must state particulars as to the dependant on whose behalf the application is made: while if there is any conflict of interest between the dependants, or if any dependants neglect or refuse to join in the application, they may be named as respondents. This rule appears to me to adopt a procedure closely analogous to that under the Fatal Accidents Act. The claiming dependants must be named; the judge is given notice that there are or may be other dependants; but it seems to me very clear that, if the dependants named as respondents continue at the hearing to neglect or refuse to join in the application, the judge's duty is to ignore them and to distribute amongst those who do make the application the lump sum compensation available in accordance with the provisions of the Act. I can see no reason at all for thinking that the judge should in any way take into account the claims of persons who neglect or refuse to apply for compensation. In the present case the widows did not claim because they had elected to claim independently of the Act and were deprived by s. 29 of the right to claim. I doubt whether in the circumstances they can be said to have neglected or refused to join in the application, words which may be thought to apply only to those who otherwise would have a lawful claim. But in any case the judge was made fully aware in each proceeding of the existence of the widow; indeed he had already dealt with her case under the Employers' Liability Act actions; and no objection based upon the widow not being named as respondent could have any substance. As the widows were not applicants, the judge was only doing his duty in ignoring them when awarding compensation amongst those who were applicants.

I think that an administrative difficulty may arise where the widow, not an original applicant under the Workmen's Compensation Acts, claims independently, but fails in her action or may fail on appeal and yet seeks to recover compensation from the Court or appellate tribunal under s. 29,

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sub-s. 2. Where there is such an independent claim it may be proper for the judge in the compensation arbitration to withhold final apportionment of the lump sum until the proceedings have ended. No such problem of course arises in the present case. Another problem that was suggested during argument was whether when the widow was claiming independently she should be taken into account when assessing the total lump sum under the provisions of r. 8. I incline to think that those provisions only relate to dependants who are in fact claimants, but the matter does not arise in the present case, and I express no considered opinion about it. On the whole case it appears to me that the learned county court judge in a rather complicated set of circumstances has steered a course correct in every particular; and that his judgments and awards should be restored and this appeal be allowed.

My Lords, I am asked by my noble and learned friend Lord Thankerton to say that he concurs in the opinion which I have just delivered.

LORD RUSSELL OF KILLOWEN. My Lords, I have had the opportunity of reading and considering the opinions of my noble and learned friends Lord Atkin and Lord Macmillan, and I agree with their reasoning and conclusions. I cannot find anything in the language used by the Legislature which would justify us in holding that the persons who elect to enforce their rights under one, rather than under the other, of the relevant statutes, are not entitled to recover up to the maximum permitted by the statute of their choice. I agree that the appeals should be allowed.

LORD MACMILLAN. My Lords, there can, I think, be little doubt that the general policy of the law has been that all claims for compensation in respect of an accident to an individual should be enforced in a single action. Where the injured party survives, this is so by the nature of things, for the title to sue is in him alone. But, when the accident is a fatal one and the deceased is survived by a number of

persons whom the law recognizes as entitled to compensation, it is obvious that, if the party at fault is not to be exposed to a multiplicity of actions, some rule must be laid down to prevent this possibility.

In Scotland, to which Lord Campbell's Act does not apply, there has always been at common law a right to compensation on the part of a limited class of the deceased's relatives enforceable against the party whose negligence has caused the fatal accident. But, as Lord Watson pointed out in this House in the case of *Darling v. Gray & Sons* (1): "There is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognised they must bring one suit, and one only, in which the damages due to them respectively might be assessed." In a subsequent case in which the rule was applied, Lord Justice-Clerk Macdonald observed that "there ought to be no difficulty in finding out what persons are entitled to put forward a claim of this sort, and either getting them to join as parties to the cause, or, if they refuse to join—thinking the action untenable, or for some other reason—proving their having done so, so that their claims may be excluded ever after": *Pollok v. Workman*. (2)

When in England in 1846, Lord Campbell's "Act for compensating the families of persons killed by accidents" for the first time rendered liable to an action of damages the wrongdoer whose wrongful act, neglect or default had caused the death of another person, the possibility of a multiplicity of actions was precluded by express enactment, as in Scotland it had been prevented by the common law. Thus s. 3 provides that "not more than one action shall lie for and in respect of the same subject matter of complaint." Every such action is to be "for the benefit of the wife, husband, parent and child" (as expanded by interpretation in s. 5) of the deceased and is to be brought by and in the name of the deceased's executor or administrator; the jury are to give

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(1) (1892) 19 R. (H. L.) 31, 32, 33.

(2) (1900) 2 F. 354, 356.

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 1938 resulting from the death to the parties respectively and by
 AVERY their verdict are to divide the amount so recovered amongst
 v. the parties (s. 2). By s. 4 the plaintiff is required to furnish
 L. & N. E. full particulars to the defendant of the person or persons on
 RY. Co. whose behalf the action is brought.
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The amending Act of 1864 merely provided that if there were no executor or administrator of the deceased, or the executor or administrator did not bring an action within six months after the death, then an action might be brought in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if brought by the executor or administrator, and that every action so to be brought should be for the benefit of the same persons as if it were brought by the executor or administrator. It still remained imperative that there should be one action and one action only.

In stating in general terms that the action is to be for the benefit of certain designated relatives of the deceased, the statute might seem to have overlooked that some of them might not desire to make any claim or might not have suffered any injury by the deceased's death. It sufficiently appears, however, from the subsequent language of the statute that the jury are to be concerned only with those who have suffered injury resulting from the death and whose claims are before the jury for adjudication. It seems to have been assumed that the plaintiff in furnishing particulars of those on whose behalf the action was brought would include the names of all those who had suffered injury by the death and desired to have their claims put forward, for no provision is made for the possible omission, wilful or negligent, of the name of a relative entitled to claim and desirous of claiming. However that may be, it is, I think, plain that the jury can deal only with the cases of those who are mentioned in the particulars and whose claims are brought before them by the plaintiff or who are themselves plaintiffs. The damages which the jury are to give are to be such as they may think proportioned to the injury resulting from the death to the

parties respectively, and the jury clearly cannot assess and apportion damages due to parties who are not before them and whose claims have not been the subject of evidence. It was settled in *Pym v. Great Northern Ry. Co.* (1) that the remedy given by the statute is to individuals, not to a class, but it still remains essential that one action only shall be brought and if any individual who has a claim is not either a plaintiff or mentioned in the particulars as a person on whose behalf the action is brought, so much the worse for that individual; he cannot bring a second action against the wrongdoer.

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The Employers' Liability Act, 1880 (which applies to Scotland), in doing away with the defence of common employment in certain instances, did not affect the requirement that there should be only one action, but it introduced a statutory maximum of compensation, namely, three years' estimated earnings, which applies as well to cases brought by the injured workman himself as to cases brought by his legal personal representatives and any persons entitled in the case of death. Before the imposition of a statutory maximum the jury assessed the full amount of damages proportioned to the injury suffered by each of the claimants before them. The effect of imposing a statutory maximum was merely to require them to make their apportionment of damages within that maximum. If the claims proved to the satisfaction of the jury when added together do not exceed the statutory maximum, the claimants will receive their awards in full; if they do exceed the maximum, they must be scaled down so as to keep within the maximum.

In the present case of the appellant, Mrs. Avery, she sued alone and she declared that she brought her action on behalf of herself alone. The statute entitled her to do so. She proved that she had suffered injury by reason of her husband's death to an amount at least equal to the maximum allowed by the 1880 Act. I can see no reason why she should not have judgment for the damages which she proved herself to have sustained. It is true that her daughter had a claim

(1) 4 B. & S. 396.

H. L. (E.) which Mrs. Avery ignored, but the statute did not require
 1938 her either to join her daughter as a plaintiff, or to declare
 AVERY that she brought the action on behalf of her daughter as well
 v. as herself. The Court had only Mrs. Avery's claim before it
 L. & N. E. and was competent to award her the full amount of damages
 Ry. Co. which she established up to the statutory maximum. What
 Lord Macmillan. remedy, if any, the daughter might have against her mother
 for not including her claim I do not find it necessary to
 consider. The daughter at any rate could not bring another
 action against the defendants.

When the Workmen's Compensation legislation was introduced in 1897, an entirely new chapter was opened. New grounds of liability were created and new claimants were admitted. But I think that it was still within the contemplation of the Legislature that in respect of one accident to an individual workman there should be one set of proceedings and one only. The remedies provided by the new Act were, I think, intended to be alternative to, and not cumulative with, other remedies. Where the workman is not fatally injured and the compensation under the Workmen's Compensation Act is recoverable by himself, this is plainly so; "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act": s. 29, sub-s. 1. The injured workman has an option to claim compensation under the Act or to take proceedings independently of the Act, but he cannot do both.

But if the accident is a fatal one, difficulties present themselves. Sect. 48, sub-s. 3, of the 1925 Act provides that "Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable." As in the case of actions under Lord Campbell's Act, so in the case of proceedings under the Workmen's Compensation Act I think that it was contemplated that there should be only one application for compensation whatever the number of persons having claims. Thus the Workmen's Compensation

Rules, 1926, require that all persons "whose presence at the arbitration may be necessary to enable the judge or arbitrator effectively and completely to adjudicate upon all questions involved" shall be parties either as applicants or as respondents. (See rr. 2, 3, 4.) But in the case of *Kinneil Cannel and Coking Coal Co. v. Waddell* (1), which was a Scottish appeal, this House held that where a workman has been fatally injured the right to compensation under the Act vests in his dependants not as a body but as individuals, and that arbitration proceedings taken by a dependent stepson of a deceased workman against his employers were no barrier under s. 29, sub-s. 1, to a common law action against them by his widow. The option under s. 29, sub-s. 1, is thus personal to each dependant of a deceased workman, and consequently there may arise out of one and the same accident concurrently proceedings under the Workmen's Compensation Act and proceedings independent of that Act, brought by different dependants of the deceased workman. The principle of one accident, one action, is gone.

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I am bound to say that I doubt if this was intended by the Legislature. The language of s. 29, sub-s. 1, suggests the contrary. But the effect of the subsequent interpretation section in requiring every reference in the Act to a workman to include, where the workman is dead, a reference to his dependants, as construed in this House, is undoubtedly to permit duplication of proceedings.

This is what has happened in the present series of cases. It was no doubt their anxiety to avoid the anomalous consequences which may result from concurrent proceedings under the Workmen's Compensation Act and under Lord Campbell's Act which induced the learned judges of the Court of Appeal to devise the ingenious expedient which they have embodied in their judgment. But with all respect I cannot find any legal justification for it. I do not see any warrant for limiting the independent rights of Mrs. Avery and her daughter in the independent proceedings which they have chosen to bring. Mrs. Avery brings her action under Lord Campbell's Act

H. L. (E.) and proves that she has suffered injury by the death of her husband to at least the extent of the maximum of three years' estimated earnings which the Employers' Liability Act allows. Why should she not have judgment accordingly? Her daughter, as the law permits her to do, initiates independent proceedings under the Workmen's Compensation Act, and is found entitled to compensation within the maximum prescribed by s. 8 of the Act. Why should it not be awarded to her? To these questions I can see no answer, nor to the similar questions which may be asked in the cases of all the other appellants. I therefore agree with your Lordships that the appeals should be allowed, the cross-appeals dismissed, and the judgments of the county court judge restored.

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While this must be our decision, I do not fail to observe the difficulties which may lie in store in view of the departure from the principle of one accident one action which has now been sanctioned. If one dependant proceeds under the Workmen's Compensation Act and obtains the maximum permissible compensation and another dependant who has elected to proceed independently of that Act fails in his action and recurs under s. 29, sub-s. 2, to his right under the Workmen's Compensation Act, how is his claim to be met? Anomalies suggest themselves also in the calculation of the maximum lump sum under s. 8. Suppose the workman leaves one or more dependent children under fifteen who elect to proceed independently of the Act and a widow who claims under the Act—is the permissible award to include a children's allowance and is the aggregate maximum to be 600*l.*? Again, if all the dependants who were wholly dependent on the deceased workman's earnings elect to proceed independently of the Act and a partial dependant proceeds under the Workmen's Compensation Act, does the statutory maximum of 300*l.* under s. 8, sub-s. 2 (i.), apply? Can the same accident involve the employers in liability up to 600*l.* under the Workmen's Compensation Act and up to three years' earnings under Lord Campbell's Act and the Employers' Liability Act, or possibly an indefinite sum at common law?

It is considerations such as these which cause me to doubt whether the Legislature had in view the situation which the present cases illustrate. But it is for the Legislature, rather than for your Lordships, to supply the remedy for such anomalies, and the Court of Appeal's attempt to do so must be pronounced ineffectual.

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Appeal allowed.

Solicitors for appellants : *Pattinson & Brewer.*

Solicitor for respondents : *I. B. Pritchard.*

[PRIVY COUNCIL.]

J. C.* 1938 March 7.	AHMED ANGULLIA BIN HADJEE) MOHAMED SALLEH ANGULLIA .) AND ESTATE AND TRUST AGENCIES (1927),) LIMITED, AND OTHERS.)	APPELLANT ; RESPONDENTS.
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ON APPEAL FROM THE COURT OF APPEAL OF THE
STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

*Straits Settlements (Singapore)—Administration—Intestate's uncompleted
enforceable contract—Duty of executor to complete—Onerous contract.*

Prima facie it is the duty of a legal personal representative to perform all the contracts of his testator or intestate, as the case may be, that can be enforced whether by way of specific performance or otherwise. In the case of an enforceable onerous contract he ought not to neglect any opportunity of coming to terms with the other contracting party which may benefit the estate ; but the breaking of an enforceable contract is an unlawful act, and it is not the duty of an executor or administrator to commit such an act.

Whether the completion of a contract will be for the benefit of the estate is not the test to be applied.

Cooper v. Jarman (1866) L. R. 3 Eq. 98, discussed and explained.

Judgment of the Court of Appeal of the Straits Settlements (Settlement of Singapore) [1936] S. S. L. R. 28, reversed.

APPEAL (No. 124 of 1936) from a judgment of the Court of Appeal of the Straits Settlements (Settlement of Singapore) (January 18, 1936) affirming an order of Burton A.C.J. made upon a reference by the Registrar of the Court of a question arising upon the taking of certain accounts.

On January 3, 1927, one Kavena Hadjee Mohamed Yoosuf conveyed certain lands in Singapore to his wife and himself upon trust for himself for life and after his death upon trust (subject to certain provisions as to maintenance) for his son, the respondent Kader Ebrahim, if he should attain the age of twenty-one, and in default upon trust for the said son's

* *Present* : LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SIDNEY ROWLATT, and SIR GEORGE RANKIN.

children as therein mentioned, with an ultimate trust in favour of the settlor's (Yoosuf's) wife and a daughter. On July 15, 1927, Yoosuf entered into a contract with one Tan Peck Hood, a building contractor, for the erection on part of the settled land of six shops, at a cost of \$44,572. Hood had completed about three-quarters of the work when, on July 18, 1928, Yoosuf died. At that time Hood had been paid over \$28,000 of the contract price, and a balance of some \$16,000 remained due to him subject to his due performance of the contract. After the death of Yoosuf a document which purported to be his will, dated May 25, 1928, was admitted to probate, probate being granted on September 10, 1928, to the appellant, Ahmed Angullia bin Hadjee Mohamed Salleh Angullia, who had been thereby appointed the sole executor. The appellant proceeded to administer the estate, and in his capacity of executor paid \$17,276 to Hood, who had in the meantime completed the erection of the six shops. In order to provide that sum the appellant, as executor, had mortgaged some unsettled property forming part of Yoosuf's estate, and in respect of such mortgage a sum of \$3702.96 was paid by the appellant by way of interest.

On January 7, 1932, probate of the alleged will was revoked by order of the Court on the ground that the same had not been properly executed, and Yoosuf accordingly died intestate. The respondents, Estate & Trust Agencies (1927), Ltd., were then appointed administrator of the intestate's estate, and on May 16, 1934, they issued an originating summons in the Supreme Court of the Straits Settlements (Settlement of Singapore) for the determination of the question whether the \$17,276 paid to Hood ought to be borne by the settled property, or ought to be paid out of the intestate's estate, and asking for general administration of such estate so far as might be necessary. The summons came on for hearing before Prichard J., who declared that the cost of completing the six shops ought to be paid out of the settled property, and made an order for the administration of the intestate's estate, including an account in the usual form of the intestate's personal estate come to the hands of the appellant. The

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respondent Kader Ebrahim appealed to the Court of Appeal from so much of that order as declared that the settled estate should bear the cost of completing the six shops, and such appeal was allowed, the Court declaring that such cost was not recoverable out of the settled properties, without prejudice to any question that might arise as to how such cost should be borne as between the present appellant and the intestate's estate.

The appellant's account of the intestate's estate come to his hands was in due course brought in before the Registrar of the Court, and in that account the appellant had credited himself with the two sums in question as being properly payable out of the estate. The administrator and the next of kin objected, and thereupon the Registrar, pursuant to Order 51, r. 20, of the Rules of the Supreme Court, 1934, referred the question to the judge for determination. The reference came on for hearing before Burton A.C.J., and he, by an order dated October 10, 1935, directed the Registrar to disallow in the appellant's account the \$17,276, except so much of it as the Registrar should consider that it would have been fair to pay to Hood as compensation for the breach of the contract to build the shops if the contract had been broken at the death of the intestate, and also to disallow so much of the \$3702.96 as represented interest upon such part of the \$17,276 as was directed to be disallowed.

An appeal to the Court of Appeal (Huggard C.J., Whitley and Terrell JJ.) was dismissed, the Court being of the opinion that the case was covered by the decision of North J. in *In re Day. Sprake v. Day* (1), from which they said that they were not prepared to dissent. The appeal is reported at [1936] S. S. L. R. 28.

1938. Feb. 3, 4. *A. F. Topham K.C.* and *J. L. Stone* for the appellant. It is the duty of an executor or administrator to complete the contract of his testator or intestate. *Holt v. Holt* (2) seems to indicate that in that case the heir was entitled to claim that the executor should carry out the

(1) [1898] 2 Ch. 510.

(2) (1694) 2 Vern. 322.

contract. The principle in *Cooper v. Jarman* (1) which, it is submitted, governs the present case, is that it was the duty of the executor to carry out the contract; it could not have been a breach of trust to allow the builder to complete the contract. What was decided in *Cooper v. Jarman* (1) was that there was an obligation of the testator binding on the executor, and the executor must perform it. The judgment of Lord Romilly M.R. in that case is right, and for the reasons which he stated, which are most convincing. In *In re Day. Sprake v. Day* (2) the position was different, because there the executor for some reason did not complete, and the point was whether a stranger could compel him to complete when he had decided not to do so. That was quite a different case from the present, where the executor has performed the contract.

An executor's primary duty is to discharge the liabilities of the estate, or, if possible and advisable, to endeavour to enter into a compromise in regard to them which may benefit the estate; it might be an error of judgment if he failed to do so; but it would not be a breach of trust. The basis of the judgment of Huggard C.J. in the Court of Appeal is his statement that "the test to be applied in each case" is whether the completion of the contract is for the benefit "of the deceased's estate" (3), and he said that that is what North J. held in *In re Day. Sprake v. Day*. (2) It is submitted, with respect, that North J. did not say that, and that that is not the test. The matter may have to be decided on the general principles governing the obligation of an executor, and it is submitted that in a case of this kind it was the duty of the executor to perform the liabilities and carry out the duties binding on his testator; in a sense it was not completing a contract, but paying for the completion of the contract by the builder. What the executor in fact did was to perform an obligation of the testator to pay for the shops when completed. There was a duty, or at any rate a power, on the executor to carry out this contract; the testator was liable on the contract, and his personal representative was

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(3) [1936] S. S. L. R. 39.

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Going back to very early times it is found that the primary obligation of an executor is to pay the debts and perform the liabilities of the testator before carrying out his bounty : Perkins's Profitable Book, 1827 (translation of the work written in Norman French in the time of Henry VIII.), p. 94, paras. 486, 488. (2) Ever since that time it has been the rule that a personal representative's duty is to perform the obligations of the testator in priority to his bounty. In the present case the obligation of the testator was to carry out the contract he had made with the builder, and that obligation passed to the executor. It is true that the builder could not, in all probability, specifically enforce the contract ; but, if it had been broken, he could have brought an action for damages. It may be said against the executor that if he had approached the builder it might be that he could have settled the claim for a less sum than would have to be paid to complete the contract. There is no evidence whatever of that. The onus lies on any beneficiary who says that an executor, who is prima facie carrying out his duty and carrying out the obligations of the testator, is committing a breach of trust. There is no evidence to show that it was the appellant's duty to arrange with the builder not to complete the contract, and to allow himself to be sued for damages.

It is still open on this appeal, having regard to the course which these proceedings have taken, to say that the appellant was given no opportunity of raising statutory and other defences open to an executor charged with devastavit and breach of duty, and the further question arises to what extent an executor can be surcharged on an originating summons without any evidence of facts and circumstances.

On an ordinary common account made in an originating summons, without any allegation of breach of trust, the liability in question could not be imposed on the appellant—it is not something which is per se a breach of trust : *Re Stuart. Smith v. Stuart.* (3)

(1) (1839) 10 A. & E. 42.

(2) p. 182 in an earlier edition, 1657.

(3) (1896) 74 L. T. 546.

C. D. Myles and *H. E. Francis* for the respondents. It is the duty of an executor to do his best for the estate. If the appellant need not have spent this sum of \$20,000 he was guilty of a *devastavit* in so doing. There is nothing immoral in breaking a contract, and if an executor can benefit the estate by committing an actionable wrong and paying damages therefor, so that the person wronged really suffered nothing in the end, it is his duty to do so. If in the present case the carrying out of the contract would necessarily cause much more expense to the estate than paying damages for its breach, it was the duty of the appellant to pay such damages. It has not been disputed that the builder would have been satisfied with a much less payment—for loss of expected profits—and any payment in excess of that sum is a *devastavit*. [With regard to the liability of an executor to pay a statute-barred debt reference was made to *Midgley v. Midgley*. (1)]

In *In re Day. Sprake v. Day* (2) the executors refused to allow the building to be completed, and that should have been done in the present case. Although *Sprake v. Day* (2) is not on all fours with this case, it does go a certain distance, and it necessarily follows from it that in this case the appellant ought not to have expended the money. His proper course was to apply to the Court for directions. He should have endeavoured to come to some arrangement with the builder under which the obligation could have been thrown on the persons getting the benefit of the work. He never took any steps of that kind to protect this estate. He treated the settled estate and the testator's estate as one. In *Cooper v. Jarman* (3) the person held entitled was the heir-at-law; in the present case and in *Sprake v. Day* (2) the person taking under the voluntary settlement (Kader Ebrahim) was a stranger to the estate. North J. in *Sprake v. Day* (2) clearly distinguishes between an heir-at-law and a person taking under a voluntary settlement. The onus is on the executor to show that it was a proper payment. *Sprake v. Day* (2) shows that *Cooper v. Jarman* (3) is a case which is not based upon a

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principle which is correct, and that it ought not to be followed. It was the duty of the appellant to justify this payment, affirmatively, and he has not done so, and it does appear, notwithstanding the inconclusive nature of the evidence, that he could, with reasonable certainty, have saved a great deal of expense to the estate by not performing the contract.

H. E. Francis followed, and referred to *Midgley v. Midgley* (1), *In re Rowson*. *Field v. White* (2), and to Salmond on the Law of Torts, 8th ed., p. 392.

A. F. Topham K.C. replied. In *In re Rowson*. *Field v. White* (2) Bowen L.J. laid down the proposition that "The duty of executors or administrators is, after paying the funeral expenses and collecting the assets, to pay the just debts and to satisfy just claims against a testator's estate." (3)

March 7. The judgment of their Lordships was delivered by LORD ROMER. This appeal raises an interesting question as to the duties of an executor in relation to the testator's contracts remaining uncompleted at his death.

The facts that give rise to it are, so far as material, as follows: On January 3, 1927, Kavena Hadjee Mohamed Yoosuf, hereinafter referred to as the intestate, conveyed certain lands in Singapore to his wife, the respondent Fatimah, and himself upon trust for himself for life and after his death upon trust (subject to certain provisions as to maintenance) for his son, the respondent Kader Ebrahim, if he should attain the age of 21, and in default upon trust for the said son's children as therein mentioned with an ultimate trust in favour of the intestate's said wife and a daughter. On July 15, 1927, the intestate entered into a contract with one Tan Peck Hood, a building contractor, which provided (as subsequently modified) for the erection on part of the settled land of six shops at a cost of \$44,572. Hood proceeded with the work and had completed about three-quarters of it when, on July 18, 1928, the intestate died. At that time Hood had been paid over \$28,000 of the contract price, and a balance

(1) [1893] 3 Ch. 282.

(2) (1885) 29 Ch. D. 358.

(3) *Ibid.* 363.

of some \$16,000 accordingly remained due to him subject to his due performance of the contract. Their Lordships have no precise information as to how much of the \$16,000 represented work completed but not paid for at the death of the intestate. As, however, three-quarters of the work had been done, about \$5,000 out of the \$16,000 would appear to have already been earned by the contractor. After the death of the intestate a document which purported to be his will, and which was dated May 25, 1928, was admitted to probate, probate being granted on September 10, 1928, to the appellant, who had been thereby appointed the sole executor. The appellant proceeded to administer the intestate's estate, and in his capacity of executor paid \$17,276 to Hood, who had in the meantime completed the erection of the six shops. It is not disputed that this was the sum due to Hood upon such completion. In order to provide this sum the appellant, as executor, mortgaged some property forming part of the intestate's estate, and in respect of such mortgage a sum of \$3702.96 was paid by the appellant by way of interest.

On January 7, 1932, probate of the alleged will was revoked by order of the Court on the ground that the same had not been properly executed, and thereupon the respondents Estate and Trust Agencies (1927), Ltd., were appointed administrator of the intestate's estate. Such respondents are hereinafter referred to as the administrator.

On May 16, 1934, the administrator issued an originating summons in the Supreme Court of the Straits Settlements (Settlement of Singapore) for the determination of the question whether the sum of \$17,276 paid to Hood ought to be borne by the settled property, or ought to be paid out of the intestate's estate, and asking for general administration of such estate so far as might be necessary. The summons came on for hearing before Prichard J., who declared that the cost of completing the six shops ought to be paid out of the settled property, and made an order for the administration of the intestate's estate, including an account in the usual form of the intestate's personal estate come to the hands of the appellant. The respondent Kader Ebrahim appealed

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to the Court of Appeal from so much of this order as declared that the settled estate should bear the costs of completing the six shops, and such appeal was allowed, the Court declaring that such costs were not recoverable out of the settled properties, without prejudice to any question that might arise as to how such costs should be borne as between the present appellant and the intestate's estate.

Neither in the order of Prichard J. nor in that of the Court of Appeal does any distinction appear to have been drawn between the cost of the work done on the shops after the death of the intestate and the costs of that done, but not paid for, in his lifetime ; and it must be taken that the costs referred to in the two orders consisted of the whole of the \$17,276 and the \$3702.96 interest.

The appellant's account of the intestate's estate come to his hands was in due course brought in before the Registrar of the Court, and in that account the appellant credited himself with the two sums in question as being properly payable out of the estate. The administrator and the next of kin objected, and thereupon the Registrar, pursuant to Order 51, r. 20, of the Rules of the Supreme Court, 1934, referred the question to the judge for determination.

The reference came on for hearing before Burton A.C.J., and he, by an order dated October 10, 1935, directed the Registrar to disallow in the appellant's account the \$17,276, except so much of it as the Registrar should consider it would have been fair to pay to Hood as compensation for the breach of the contract to build the shops if the contract had been broken at the death of the intestate, and also to disallow so much of the \$3702.96 as represented interest upon such part of the \$17,276 as was directed to be disallowed. He further ordered the appellant to pay the administrator's costs of this reference, and also those of the five other respondents to this appeal, such respondents being the persons entitled beneficially to the property of the intestate.

In support of his claim to be allowed the whole of the two sums in question, the appellant relied upon the decision of

Lord Romilly M.R. in *Cooper v. Jarman*. (1) That case, in some respects, bears so close a resemblance to the present one that it must be examined in some detail. The facts were these. An intestate had entered into a contract with some builders for the erection of a house on some freehold land belonging to him. At the time of his death the house was in course of erection, but had not been finished. Letters of administration were in due course granted to two of his children, one of whom happened to be his heir-at-law. The house having been completed by the builder after the intestate's death, the heir-at-law, as one of the intestate's legal personal representatives, paid to the builder out of the intestate's personal estate the cost of such completion. According to the headnote of the report, it was held that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. In point of fact Lord Romilly held nothing of the sort. It had, indeed, been laid down in *Holt v. Holt* (2) that the heir-at-law had such a right in the like circumstances, though on what grounds the decision in that case was founded is not at all apparent. It is true, too, that *Holt v. Holt* (2) was cited in the arguments on behalf of the heir-at-law in *Cooper v. Jarman*. (1) But the question in the last-mentioned case was whether the heir-at-law in his capacity of legal personal representative of the intestate ought to be allowed, in taking the account of the personal estate come to his hands, the cost of completing the house. The decision was in favour of the heir-at-law, but it was not in any way based upon any rights he possessed as heir-at-law. The case of *Holt v. Holt* (2) is not even mentioned in Lord Romilly's judgment. His judgment was based solely upon the rights and duties of a legal personal representative in such circumstances, and would have been precisely the same if the heir-at-law had not himself been one of the administrators of the intestate. It had been argued that the duty of the administrator was to commit a breach of the contract entered into by the intestate, inasmuch as it was one of which equity would not have decreed specific performance, and to

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(1) (1866) L. R. 3 Eq. 98.

(2) (1694) 2 Vern. 322.

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pay the builder the damages occasioned by that breach. Lord Romilly would have none of this: "it cannot be good law," he said (1), "that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate."

He then rejected the contention that the duty of a legal personal representative in this connection depends in any way upon the question whether the contract is, or is not, one of which specific performance can be enforced, and proceeded as follows (2): "it cannot, in my opinion, be law, that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs. Lawrence," [the builders in question] "and hinder them from coming on the land, and prevent them from completing the contract because, in the opinion of the next of kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfilment of the contract."

He then pointed out that in any case the administrator, if he paid the contractor damages without suit, might be charged by the next of kin with having paid more than a jury would have awarded, and that if he went to law the amount of damages found by the jury, together with the costs of the suit, might exceed the cost of completing the contract, and he concluded as follows (2): "The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty, in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty."

All of which appears to their Lordships to be both good law and good sense. Prima facie it is the duty of a legal personal representative to perform all contracts of his testator or intestate, as the case may be, that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him

(1) L. R. 3 Eq. 101.

(2) Ibid. 102.

for any reason, such as the Statute of Frauds, and is one that it would be disadvantageous to the estate to perform, it is a different matter (see *In re Rowson. Field v. White* (1)); though it seems to be settled that he is not bound to plead the Statute of Limitations, and may pay a statute barred debt unless it has been judicially declared to be so (see *Midgley v. Midgley*. (2)) Nor, in the case of an enforceable onerous contract, ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act, and, in their Lordships' judgment, it can never be the duty of an executor or an administrator to commit such an act. It is this principle that lies at the root of the decision in *Cooper v. Jarman*. (3)

Burton A.C.J., however, thought that *Cooper v. Jarman* (3) was distinguishable from the present case, in that Kader Ebrahim was not the heir-at-law of the intestate. He was, said the learned Chief Justice, a stranger to the intestate's estate, and unlike the heir-at-law in *Cooper v. Jarman* (3) had no claim to have the contract carried out. In saying this he seems to have been misled by the headnote in that case, and failed to notice that the decision in no way turned upon any rights the heir-at-law might possess, but solely upon the rights and duties of the administrator. He also thought that he was warranted in refusing to follow *Cooper v. Jarman* (3) by the decision of North J. in *In re Day. Sprake v. Day*. (4) It cannot be denied that this latter decision fully justified the statement of the Acting Chief Justice that Kader Ebrahim had no claim to have the intestate's contract with the builder carried out. But it is no authority for the proposition that the cost of completing it was not proper to be allowed to the appellant in taking his account. The facts of that case were substantially as follows. A testator by his will had devised certain land to his wife for life. Shortly before his death he had entered into a contract with some builders for the erection of some cottages on the land. He had also entered into a

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(1) (1885) 29 Ch. D. 358.

(2) [1893] 3 Ch. 282.

(3) L. R. 3 Eq. 98.

(4) [1898] 2 Ch. 510.

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contract with the same builders for the erection of a house on some land that belonged not to him, but to his wife in her own right. At the time of his death neither of these contracts had been completed, and after his death his executors prevented the builders from finishing the work. The wife thereupon claimed to be entitled to have the two contracts completed at the cost of the testator's personal estate. North J. acceded to the wife's claim in respect of the first contract, but rejected it in respect of the second. He thought that *Cooper v. Jarman* (1) was an authority in her favour so far as the land devised to her was concerned, treating a devisee as being in the same position as an heir-at-law. If no distinction is to be drawn between a devisee and an heir-at-law for this purpose *Holt v. Holt* (2) was no doubt an authority in favour of the learned judge's decision. But, with all respect to him, and for the reasons already given, *Cooper v. Jarman* (1) was not. As to the second contract, he held that the wife, being a stranger to the testator's estate, had no right to have it carried out at the expense of his personal estate. Whether *Sprake v. Day* (3) was rightly decided or not is a question upon which it is unnecessary for their Lordships to express any opinion. It is sufficient to say that it has no bearing upon the present case.

An appeal from the decision of the Acting Chief Justice was taken to the Court of Appeal, and in due course came before Huggard C.J., Whitley and Terrell J.J., who, by order dated January 18, 1936, dismissed the appeal with costs. They were unanimous in holding that the appellant could not be allowed the two payments in question. Before considering the reasons given by them for this decision, reference must be made to an argument advanced before them by the appellant which was in the nature of a preliminary objection. He contended that the items relating to the erection of the shops could only be disallowed on the footing that a breach of trust had been committed by the appellant, and that as a breach of trust on his part had not been specifically pleaded he could

(1) L. R. 3 Eq. 98.

(2) 2 Vern. 322.

(3) [1898] 2 Ch. 510.

not be charged with one in taking the ordinary account of the personal estate of the intestate come to his hands. This contention was rejected by the Court of Appeal, and, in their Lordships' opinion, was rightly rejected. In taking the account the appellant could not, of course, be charged with damages occasioned to the estate by a breach of trust. But it was incumbent upon him to justify his payments, and those that he could not justify would necessarily have to be disallowed. As was said by Chitty L.J. in *In re Stevens*. *Cooke v. Stevens* (1): "on taking the common account of their receipts, executors "can properly be, and are often, charged with a devastavit "arising on the accounts themselves. On taking the account "they stand charged with their receipts; and if they seek to "discharge themselves by unlawful payments, their discharge "is disallowed."

Turning now to the reasons given by the learned judges in the Court of Appeal for thinking that the two sums in question ought to be disallowed as being unlawful payments, their Lordships find that the Chief Justice and each of his learned colleagues considered the case to be covered by the decision of North J. in *Sprake v. Day* (2), a decision which was not, of course, binding upon them, but was one from which they said they were not prepared to dissent. The Chief Justice in referring to *Cooper v. Jarman* (3) said this (4): "It was held by Lord Romilly M.R. that the heir-at-law "was entitled to have the house finished at the expense of "the personal estate of the intestate. Now when one reads "the judgment of Lord Romilly in that case it would appear "to support strongly the appellant's contention in the present "case. But Lord Romilly's judgment was considered in the "later case of *In re Day*. *Sprake v. Day* (2), and it is clear "from the decision of North J. that Lord Romilly's observa- "tions in *Cooper v. Jarman* (3) must be read in the light of "the facts of that particular case."

He then referred to the facts in *Sprake v. Day* (2) and the reasons there given by North J. for distinguishing between

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(1) [1898] 1 Ch. 162, 172.

(2) [1898] 2 Ch. 510.

(3) L. R. 3 Eq. 98.

(4) [1936] S. S. L. R. 38.

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the two contracts in that case, and proceeded as follows (1) :
“It appears to be clear from the decision in *Sprake v. Day* (2)
“that the distinction drawn by North J. between the two
“contracts was based on the fact that one property belonged
“to the testator and passed under his will, whereas the other
“property . . . belonged to a stranger. In other words,
“in one case the completion of the contract benefited the
“estate of the testator ; in the other case there was no such
“benefit. In the former case the decision in *Cooper v.*
“*Jarman* (3) therefore applied ; in the latter it did not. The
“test to be applied in each case is whether the completion
“of the contract is for the benefit of the deceased estate.”

The judgments of Whitley J. and Terrell J. proceeded upon the same line of reasoning, and upon the same view of *Cooper v. Jarman* (3) and *Sprake v. Day*. (2) They also thought that they found in those two decisions authority for the proposition that, in such a case as the present, the test to be applied is whether the completion of the contract is for the benefit of the estate of the intestate. Applying that test the Court very naturally dismissed the appeal. It was impossible to say upon the evidence that the estate of the intestate was benefited by the completion of the shops.

Their Lordships are unable to agree that the test to be applied is that adopted by the Court of Appeal. If the appellant were seeking to justify the two payments on the ground that Kader Ebrahim had a right to have the contract for the erection of the shops completed at the cost of the intestate's estate, the decision in *Cooper v. Jarman* (3) would not assist him, and the decision in *Sprake v. Day* (2), as regards the second contract in that case, would be an authority against him. But the appellant does not seek to justify the payments on any such ground. He merely seeks to justify them on the grounds stated by Lord Romilly in *Cooper v. Jarman* (3), the headnote in which case would seem to have misled the Court of Appeal just as it had misled the Acting Chief Justice in the Court below.

(1) [1936] S. S. L. R. 39.

(2) [1898] 2 Ch. 510.

(3) L. R. 3 Eq. 98.

In their Lordships' judgment, it was the duty of the appellant as the apparent legal personal representative of the intestate to honour the intestate's obligations under the contract in question unless an opportunity presented itself of coming to some arrangement with the builder that would be of advantage to the estate that he was administering. There is no evidence that any such opportunity did in fact present itself, and the onus of proving the existence of such an opportunity lay, in their Lordships' opinion, upon the respondents. Burton A.C.J. no doubt in the course of his judgment said that the contractor would have been perfectly satisfied with a sum sufficient to compensate him for loss of expected profits, and that he would have been satisfied by a payment which must have been substantially less than the \$17,276 paid to him. But in making these observations, the learned judge would appear to have been merely hazarding a guess, for there was no evidence before him as to the intentions or desires of the contractor. If a guess is to be indulged in, it would seem more probable that the contractor would have preferred to complete the contract. For, apart altogether from any loss to his reputation by leaving the shops in an unfinished state, the sudden breaking off of the work might have involved the temporary unemployment of members of his staff and the loss of the building material already on the site, seeing that he would have had no right as against Kader Ebrahim to enter upon the land for the purpose of removing it. And even if he had been willing to agree to leave the work unfinished upon the terms of being paid compensation, all such matters would have come into his calculations, and there seems no reason to suppose that he would have been content to receive merely his loss of profit or any sum less than the amount actually paid to him by the appellant. Nor could the appellant have prevented the contractor from completing the contract if the contractor wished to continue the work, for the land on which the shops were being erected was the land of Kader Ebrahim. Had, therefore, the appellant purported to repudiate the contract, he would not have benefited the estate unless the contractor

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accepted such repudiation, which seems unlikely; and, if the contractor had accepted such repudiation, and sued the appellant for damages, it is impossible to tell how much such damages, together with the costs of the action, would have amounted to. But in any case, the appellant owed no duty to the estate that he was administering to commit the unlawful act of repudiating the contract, and he is not shown to have had any opportunity of coming to a friendly arrangement with the contractor that would have been more beneficial to the intestate's estate than paying the balance of the contract price unpaid at the intestate's death.

Their Lordships are accordingly of opinion, and will humbly advise His Majesty, (1.) that the appeal should be allowed, and the orders of October 10, 1935, and January 18, 1936, should be discharged; and (2.) that the Registrar should be directed to allow in the appellant's account the sums of \$17,276 and \$3702.96.

As regards the costs, the order should be as follows:— (1.) that the respondents ought to pay to the appellant his costs as between party and party on the higher scale of the hearing before Burton A.C.J. on October 10, 1935, and before the Court of Appeal on January 18, 1936; (2.) that all costs already paid by the appellant under those orders ought to be repaid to him by the respondents respectively; (3.) that the costs of the appellant of the order of September 25, 1935, and his costs made costs of the cause by order of the Supreme Court dated August 28, 1936, ought to be paid and dealt with in all respects in the manner herein directed with reference to the costs of this appeal; (4.) that the costs of the appellant as between solicitor and client on the higher scale of the hearing of October 10, 1935, and in the Court of Appeal on January 18, 1936, and of this appeal hereinafter referred to, after giving credit for the party and party costs ordered to be paid by the respondents and recovered by him from the respondents in these proceedings, ought to be his costs in the cause; (5.) that this order ought to be without prejudice to any claim of the respondents, or any of them, to be allowed their costs of all the above mentioned proceedings

out of the estate of the intestate ; (6.) the appellant's costs of this appeal as between party and party will be paid by the respondents.

Solicitors for appellant : *Emmet & Co.*

Solicitors for respondents : *Peacock & Goddard.*

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[HOUSE OF LORDS.]

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 May 31. PANY, LIMITED) RESPONDENTS.

Workmen's Compensation—Injury by accident arising out of and in the course of employment—Inability to get work—Whether “all reasonable steps” taken to obtain employment—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 9, sub-s. 4—Workmen's Compensation Act, 1931 (21 & 22 Geo. 5, c. 18), s. 1, sub-s. 1.

Sect. 1, sub-s. 1, of the Workmen's Compensation Act, 1931, provides that if a workman has so far recovered from an injury as to be fit for employment of a certain kind, but has failed to obtain employment, and it appears to the judge either (i.) that having regard to all the circumstances it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident, or (ii.) that his failure to obtain employment is a consequence, wholly or mainly, of the injury, the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury, “provided that (i.) no order shall be made under this subsection “if it appears to the judge that the workman has not taken all “reasonable steps to obtain employment” :—

Held, that the workman, in proving his failure to obtain employment, must prove that he has made attempts, genuine and reasonable in volume, which have resulted in failure, but that the above proviso does not lay down any rule of onus as to proof of every reasonable step having been taken.

Dicta of Lord Hanworth M.R. in *Hancox v. Balfour, Beattie & Co.* (1932) 25 B. W. C. C. 596, and in *Donachie v. Whitehaven Colliery Co.* (1933) 26 B. W. C. C. 63, and dictum of Slessor L.J. in *Chapman v. Marshall, Sons & Co.* (1936) 29 B. W. C. C. 14, to the effect that the onus on the workman under the Act of 1925 of proving that he had taken all reasonable steps to obtain employment remained unaltered by the Act of 1931, disapproved.

Decision of Second Division of Court of Session 1937 S. C. 80 reversed.

APPEAL from a decision of the Second Division of the Court of Session. (1)

The workman, John McLaughlin, having in 1926 had his
 (1) 1937 S. C. 80.

* *Present* : LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, and LORD ROMER.

hand injured by accident arising out of and in the course of his employment as a dock labourer with the respondents, was paid compensation for total incapacity at the rate of $\text{£} 1\text{l. } 10\text{s.}$ per week till April 5, 1927. Following an arbitration in that year in the Sheriff Court at Glasgow an award was made by which it was found that the appellant was by then only partially incapacitated, and for that reason the compensation was reduced to $\text{£} 15\text{s.}$ per week, at which rate it was paid till April 14, 1928. As the result of a fresh arbitration a further award was made dated November 28, 1928, by which it was found that the workman was able to earn, and was in fact earning, the same wage as he had been earning before the accident, but that there was a likelihood that the condition of the injured hand might become worse in the future; the payments of the compensation were thereupon suspended as from April 14, 1928, till the further order of the Court.

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On May 17, 1935, the appellant commenced the present arbitration proceedings in the Sheriff Court at Glasgow claiming compensation for total incapacity in respect of his failure to obtain employment as a consequence wholly or mainly of the accident. At the hearing of that application the Sheriff found that it was not proved nor was it made to appear either that the appellant had taken all reasonable steps to obtain employment, or that he had not taken all reasonable steps to obtain employment; in other words, it was neither proved to the Sheriff's satisfaction, nor did it appear to him from the evidence, whether or not the workman had taken all reasonable steps to obtain employment. The Sheriff then found in fact (*a*) that since January 7, 1932, the workman had failed to obtain employment; (*b*) that but for the incapacity to his hand due to the injury he would since January 7, 1932, have been able to obtain work in the same grade in the same class of employment as before the accident; (*c*) that his failure to obtain employment was a consequence mainly of the injury; and (*d*) that it did not appear that the workman had not taken all reasonable steps to obtain employment so as to satisfy the requirements of s. 9, sub-s. 4,

H. L. (Sc.) of the Workmen's Compensation Act, 1925 (1), as amended
 1938 by s. 1, sub-s. 1, of the Workmen's Compensation Act, 1931. (2)
 McLAUGHLIN Upon these findings the Sheriff made an order that the work-
 v. man's incapacity should be treated as total incapacity resulting
 CALEDONIA from the injury, until further orders of the Court; but
 STEVE- subject to the condition that the order made should cease
 DORING to be in force if the workman received unemployment benefit,
 Co. and subject as aforesaid the Sheriff awarded the appellant
 compensation as for total incapacity at the rate of 1*l.* 10*s.*
 per week as from January 7, 1932, till the same should be
 ended, amended or redeemed by some competent process.

The Sheriff stated the following questions for the opinion
 of the Court of Session: (1.) Whether he was right in holding
 that the onus lay on the employers to show that the workman
 had not taken all reasonable steps to obtain employment;

(1) Workmen's Compensation Act, 1925, s. 9, sub-s. 4: "If a
 "workman who has so far
 "recovered from the injury as to
 "be fit for employment of a cer-
 "tain kind proves to the satis-
 "faction of the judge . . . that
 "he has taken all reasonable steps
 "to obtain, and has failed to
 "obtain, such employment, and
 "that his failure to obtain such
 "employment is a consequence,
 "wholly or mainly, of the injury,
 "the judge shall order that his
 "incapacity shall, for the purposes
 "of this Act, continue to be
 "treated as total incapacity for
 "such period, and subject to such
 "conditions, as may be provided
 "by the order, without prejudice
 "however to the right of review
 "conferred by this Act. . . ."

(2) Workmen's Compensation Act, 1931, s. 1, sub-s. 1: "Sub-
 "section (4.) of section nine of the
 "Workmen's Compensation Act,
 "1925, is hereby repealed, and the
 "following subsection shall be
 "substituted therefor:—(4.) If a
 "workman who has so far re-

"covered from the injury as to be
 "fit for employment of a certain
 "kind has failed to obtain employ-
 "ment and it appears to the
 "county court judge either (i.)
 "that, having regard to all the
 "circumstances, it is probable
 "that the workman would, but for
 "the continuing effects of the
 "injury, be able to obtain work
 "in the same grade in the same
 "class of employment as before
 "the accident; or (ii.) that his
 "failure to obtain employment is
 "a consequence, wholly or mainly,
 "of the injury, the judge shall
 "order that the workman's in-
 "capacity shall be treated as total
 "incapacity resulting from the
 "injury for such period, and
 "subject to such conditions, as
 "may be provided by the order,
 "without prejudice, however, to
 "the right of review conferred by
 "this Act: Provided that—(i.) no
 "order shall be made under this
 "subsection if it appears to the
 "judge that the workman has
 "not taken all reasonable steps to
 "obtain employment. . . ."

and (2.) whether he (the Sheriff) was entitled to award compensation as for total incapacity as from January 7, 1932.

The Court of Session, reversing the decision of the Sheriff, held that the change made upon s. 9, sub-s. 4, of the 1925 Act by the Act of 1931 had not relieved the workman of the onus of proving that he had taken all reasonable steps to obtain employment and had placed upon the employers the onus of proving the contrary; and it was still a necessary part of the workman's case that he should be able to show that he had taken all reasonable steps to obtain employment.

The workman appealed to this House.

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A. P. Duffes (of the English Bar and K.C. of the Scots Bar) and *John Wheatley* (of the Scots Bar) for the appellant. The finding by the Sheriff that it did not appear that the appellant had not taken all reasonable steps to obtain employment entitled the making of the order in favour of the appellant. It is wrong to say that there is an onus on the workman in such a case that he has exhausted every means of obtaining employment, and it is submitted that the view expressed by Lord Hanworth M.R. in *Hancox v. Balfour, Beattie & Co.* (1) and in *Donachie v. Whitehaven Colliery Co.* (2), and that of Slessor L.J. in *Chapman v. Marshall, Sons & Co.* (3) that the Act of 1931 like that of 1925 placed the onus on the workman of showing that he has taken all reasonable steps to obtain employment and has failed, before he can obtain an award under the section, is erroneous, and it is significant that Lord Hanworth in the later case of *Hughes v. Penmaenmawr & Welsh Granite Co.* (4) appeared to think that the onus was not the same under the Act of 1931 as it was under the Act of 1925, and Lord Anderson in *Docherty v. Baird & Co.* (5) said that "it may be that some relaxation in the matter of "probation was designed by the different language used in "the 1931 Act from that of the Act of 1925." We submit that that view is correct.

(1) (1932) 25 B. W. C. C. 596.

(2) (1933) 26 B. W. C. C. 63.

(3) (1936) 29 B. W. C. C. 14.

(4) (1933) 26 B. W. C. C. 99, 106.

(5) 1935 S. C. 598, 608.

H. L. (Sc.) *D. P. Blades K.C.* and *Allan G. Walker* (both of the Scots Bar) for the respondents. The question of onus has been left under the Act of 1931 as it was under the Act of 1925, and therefore it is still incumbent on the workman to prove that he has taken all reasonable steps to obtain employment and has failed. Something has to appear to the judge affirmatively, and it is for the workman to make this appear by evidence that he has in fact taken all reasonable steps to obtain employment. That he did not do in the present case. In *Moore v. Harland & Wolff* (1) it was held that the uncorroborated evidence of the workman relative to his attempts to obtain suitable employment, even though not challenged by cross-examination, was not sufficient evidence that he had taken all reasonable steps to obtain employment.

A. P. Duffes K.C. replied.

The House took time for consideration.

1938. May 31. LORD ATKIN. I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Thankerton, and, agreeing with it as I do, I only add some words of my own to explain why I feel bound to differ from the decision of the Court of Session, and from more than one decision of the Court of Appeal upon which the Court of Session relied. I will confine my remarks to the effect of the amendment in 1931 of s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, so far as it affects onus of proof. I find myself quite unable to hold that the amended clause leaves the onus upon the workman of proving that he has taken all reasonable steps to obtain employment under proviso (i.). The original clause runs: "If a workman . . . proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order," etc. Here the onus is clearly on the workman to prove three facts:

(1) 1937 S. C. 707.

(1.) that he has taken all reasonable steps to obtain such employment ; (2.) that he has failed to obtain such employment ; (3.) that his failure is a consequence wholly or mainly of the injury. In the amending clause the express obligation on the workman " to prove to the satisfaction of the judge " disappears.

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As amended, the section provides, if a workman has failed to obtain employment and it appears to the county court judge either (a) that it is probable that but for the continuing effects of his injury he would be able to obtain similar work as before, or (b) that his failure to obtain employment is a consequence wholly or mainly of the injury, the judge shall order, etc. Provided that (i.) no order shall be made under this sub-section if it appears to the judge that the workman has not taken all reasonable steps to obtain employment.

Now here are three judicial determinations provided for, two positive and one negative. The first two are strictly conditions of the judge being able to make an order.

1. The judge must be satisfied of the fact that the workman in the stage of recovery predicated has " failed to obtain "employment." These are part of the words in the original section ; and it appears plain that it is for the workman to prove this fact. If he fails, his claim fails.

2. The alternative conditions as to the effect of the injury. These must " appear to the judge "—presumably from the evidence in the case ; and similarly, if the workman fails so to make it appear to the judge, his claim fails. For all practical purposes the statute imposes the onus upon him.

3. But no order is to be made if it appears to the judge that the workman has not taken all reasonable steps to obtain employment.

Here, unless the judicial mind has received this "appearance," the workman has become entitled to his order if he has so far satisfied the statutory requirements. There must be an actual determination by the judge that the negative fact exists. Unless the judge reaches that conclusion there is no bar to the order. He may come to the conclusion on evidence given on behalf of the workman or on evidence

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given on behalf of the employer. It is the latter whose interest it is, if any, to establish the negative fact, and on the hypothesis it is the employer who will fail if no evidence producing the required conclusion is forthcoming. From that point of view the onus is, if at all, on the employer. But it seems to me, with great respect, to be a misapprehension of the section and to be inconsistent with the plain words to read it, as it appears the Lord Justice-Clerk did, in the following words: "On the other hand, the employers' contention is that it must appear to the arbitrator that the workman has taken all reasonable steps to obtain employment, that being a condition precedent of the workman's right to have his partial incapacity treated as total incapacity. "In my opinion the latter construction is the correct one." It will be observed that this involves altering the negative form of the proviso and turning a negative proviso into a condition precedent. In my opinion the sole object of removing this particular limit as to taking all reasonable steps to obtain employment from its collocation with failure to obtain employment in the original section, where it plainly formed an essential part of the workman's proof, and throwing it into a separate proviso in the amending section couched in negative form, was to remove the onus of proof from the workman.

He remains bound to prove that he has failed to obtain employment; but this he can do by evidence short of proof of taking all reasonable steps. If the judge on the whole case is left in a state of doubt as to whether all reasonable steps have been taken, the proviso (i.) will not come into operation.

It follows from what I have said that I cannot agree with the judgment of Lord Hanworth in *Hancox v. Balfour, Beattie & Co.* (1), where he says he cannot find any shifting of the onus as between the first form and the second form of the sub-section. Nor with his dictum in *Donachie v. Whitehaven Colliery Co.* (2) that this proviso really imposes a condition precedent to the application of the section and that the

workman has to establish that he has taken all reasonable steps. I say dictum, for the county court judge had found as a fact in that case that the workman had taken all reasonable steps and his finding was not disturbed. In *Hughes v. Penmaenmawr & Welsh Granite Co.* (1) the late learned Master of the Rolls, while repeating that the proviso must be treated as a condition precedent, seemed to indicate that his former view as to there being no change of onus had altered. He said (2): "the learned county court judge now can, upon "the summation of the evidence brought before him, deal "with the case if it 'appears' to the judge: that may make "a difference in the question of onus, and it may relieve the "workman from a burden otherwise falling upon him under "the old section." It follows also that the statement of Slessor L.J. as to onus in *Chapman v. Marshall, Sons & Co.* (3), to which my noble and learned friend Lord Thankerton refers, cannot be approved. I do not think that this question really arose for decision in *Docherty v. Baird & Co.* (4), but so far as there are dicta to the contrary of what I have said I must hold them to be mistaken. For the reasons I have given I think that the line of English authorities as to the meaning of this proviso are not to be followed, and I agree with the motion as suggested by my noble and learned friend.

LORD THANKERTON. The appellant, in May, 1926, was injured by an accident arising out of and in the course of his employment with the respondents as a dock labourer. The injury was to his left hand, and in consequence of it the middle and ring fingers of that hand were amputated. He was paid compensation by the respondents as for total incapacity till April, 1927, and, under an award dated June 27, 1927, as for partial incapacity from April, 1927, until April 14, 1928, as from which date the payments were suspended as the result of an arbitration, in which it was found (inter alia) by an award dated November 28, 1928, that the appellant was able, working as a hatchmouth man,

(1) 26 B. W. C. C. 99.
 (2) Ibid. 106.

(3) 29 B. W. C. C. 14, 16.
 (4) 1935 S. C. 598.

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to earn, and was in fact earning, the same amount as he had been able to earn before the accident as a general dock labourer, but that there was a likelihood that the condition of the injured hand might become worse in the future.

On May 17, 1935, the appellant, having been unemployed since January, 1932, raised the present arbitration proceedings, in which he claimed that his incapacity should be treated as total incapacity resulting from the injury under the provisions of s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, as amended by s. 1, sub-s. 1, of the Workmen's Compensation Act, 1931.

After proof had been led before him, the arbitrator, on June 2, 1936, made an award in favour of the appellant in the following terms :—

"Finds in fact (1.) that since January 7, 1932, the claimant "has failed to obtain employment ; (2.) that but for the "incapacity in his left hand due to the injury he would, "since January 7, 1932, have been able to obtain work in "the same grade in the same class of employment as before "the accident, namely, as a general dock labourer ; (3.) that "his failure to obtain employment is a consequence mainly of "the injury ; and (4.) that it does not appear that the "claimant has not taken all reasonable steps to obtain employ- "ment ; therefore orders that the claimant's incapacity shall "be treated as total incapacity resulting from the injury as "from January 7, 1932, until the further orders of the Court ; "but subject to the condition that this order shall cease to "be in force if the claimant receives unemployment benefit ; "and in respect of the foregoing order, and subject as aforesaid, "awards the claimant compensation against the respondents "as for total incapacity at the rate of 1*l.* 10*s.* sterling per "week as from January 7, 1932, till the same shall be ended, "amended, or redeemed by some competent process."

At the request of the respondents the arbitrator stated a case for the Court of Session under s. 49 of the Act of 1925, in which the questions for answer by the Court are :—

"1. Was I right in holding that the onus lay on the

"appellants to shew that the respondent had not taken all reasonable steps to obtain employment ? H. L. (Sc.)

"2. Was I entitled to award compensation on the basis of total incapacity as from January 7, 1932 ? " 1938
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On November 26, 1936, the Second Division of the Court of Session answered both questions in the negative and sustained the appeal. The present appeal is taken against that decision.

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In addition to the award of the arbitrator, already quoted, it is only necessary to quote para. 3 of the stated case, which states as follows :—

"3. It was not proved, and it was not made to appear, either (a) that the respondent had taken all reasonable steps to obtain employment, or (b) that he had not taken all reasonable steps to obtain employment. In other words, it was neither proved to my satisfaction, nor did it appear to me from the evidence, whether or not the respondent had taken all reasonable steps to obtain employment. Quoad ultra my findings on the evidence are sufficiently indicated in the terms of my award."

The decision of this appeal turns on the proper construction of the revised form of s. 9, sub-s. 4, of the Act of 1925, which was substituted for the original provision by the Act of 1931. The learned judges of the Second Division have construed it in agreement with certain decisions of the Court of Appeal in England referred to later, whereas the arbitrator had come to an exactly contrary decision, in express disagreement with these decisions, which were not technically binding on him, and had held that the onus was transferred to the employers by the 1931 Act. In both Courts that question was treated as one of onus. With all respect, I find myself unable to agree with any of these views.

The original s. 9, sub-s. 4, of the Act of 1925, as applied to Scotland, and so far as material to the present question, provided as follows : " If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the sheriff that he has taken all reasonable steps to obtain, and has failed to

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"obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the sheriff shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by this Act."

There can be no doubt that, under this provision, the workman was required to satisfy the arbitrator by evidence that he had taken "all reasonable steps" to obtain the employment referred to as a condition of obtaining the benefit of the sub-section. That might properly be described as an onus placed on the workman, and there can be little doubt that in many instances it proved a heavy one.

This provision was superseded by the revised form enacted by the Act of 1931, which is as follows: "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the sheriff either—(i.) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident; or (ii.) that his failure to obtain employment is a consequence, wholly or mainly, of the injury; the sheriff shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by this Act: Provided that (i.) no order shall be made under this subsection if it appears to the sheriff that the workman has not taken all reasonable steps to obtain employment."

The substantial alteration of the provision as to the steps taken to obtain employment naturally suggests that it was intended to modify the original provision, but shortly after the passing of the Act it was held by the Court of Appeal in *Hancox v. Balfour, Beattie & Co.* (1) that the onus on the

workman of proving that he had taken all reasonable steps to obtain employment remained unaltered. Lord Hanworth M.R. stated (1) : " I cannot find any shifting of the onus as between "the first form and the second form of the subsection." This decision was followed in *Donachie v. Whitehaven Colliery Co.* (2), in which Lord Hanworth M.R. expressed the view that proviso (i.) of the sub-section really imposed a condition precedent to the application of the sub-section ; in *Hughes v. Penmaenmawr & Welsh Granite Co.* (3), in which it is true that the learned Master of the Rolls expressed a slightly modified opinion ; and in *Chapman v. Marshall, Sons & Co.* (4), in which Slessor L.J. said : " It has been now decisively held "that to satisfy that proviso the onus of proof is on the "workman." In the present case the learned judges of the Second Division all express their agreement with the above decisions. I should add that, in my opinion, the case of *Docherty v. Baird & Co.* (5) is of no assistance on this point, and Lord Anderson, whose opinion is referred to by the learned judges in the present case, does not appear to me to have dealt with the present point at all, for, in speaking of provisos to the sub-section, he is not referring to the provisos properly so called, but to conditions (i.) and (ii.) as to obtaining work in the same grade and class and as to the failure being a consequence of the injury.

My reluctance to hold that the alterations on this point in the revised form of the sub-section are otiose is satisfied by the clear view which I take that these decisions, with the greatest respect to the learned judges who pronounced them, proceed on an incorrect construction of the sub-section.

So far as the taking of steps to obtain employment is concerned, the workman, in order to obtain the benefit of the sub-section, requires to prove, as provided in the opening sentence, that he " has failed to obtain employment." It is clear to me that the workman must accordingly prove that he has made attempts to obtain employment which have

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(1) 25 B. W. C. C. 602.

(2) 26 B. W. C. C. 63.

(3) 26 B. W. C. C. 99.

(4) 29 B. W. C. C. 14, 16.

(5) 1935 S. C. 598.

H. L. (Sc.) resulted in failure, and that he must prove reasonable attempts to obtain employment. For instance, I cannot think that one isolated attempt would satisfy this provision; the attempts must be genuine and reasonable in volume, and this must be established by the evidence before the arbitrator. There remains the first proviso: in my opinion the words "if it appears to the sheriff" do not lay down any rule of onus at all, but mean "if it appears to the sheriff on the evidence before him" that the workman has not exhausted all reasonable steps to obtain employment. This may appear from the evidence of the workman himself, as would seem to have been the case in *Hancox's* case (1), in which my noble and learned friend Lord Romer (then Romer L.J.) took that view of the county court judge's findings, or it may be established by substantive evidence led by the employer; but that is not properly described as a question of onus.

Turning to the present case, the arbitrator, in accordance with practice, has appended his note to the stated case, but it is well established that the note can only be referred to for limited purposes. In *Scrimgeour v. Thomson & Co.* (2) this House expressly approved of the opinion of Lord Justice-Clerk Scott Dickson in *Espie v. British Basket Co.* (3) that it is not legitimate to use statements in the note for the purpose of supplementing the specific findings in fact which are contained in the stated case, but that it is legitimate to use the note in order to discover the ratio in law of the arbitrator's judgment.

In his award the arbitrator has found in fact (1.) that since January 7, 1932, the claimant has failed to obtain employment, and (4.) that it does not appear that the claimant has not taken all reasonable steps to obtain employment. I do not find anything in the arbitrator's note to suggest that he has misdirected himself as to the first of these findings, which follows the opening words of the sub-section, and it seems clear that, while the first finding covers attempts reasonable

(1) 25 B. W. C. C. 596.

(3) 1920 S. C. 655, 657; 13

(2) 1922 S. C. (H. L.) 64; 15
B. W. C. C. 77.

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in genuineness and volume, the fourth finding is dealing, quite properly, with proof of the complete exhaustion of every reasonable step. This is confirmed by the statement in para. 3 of the stated case. It follows that there was not evidence before the arbitrator which would lead him to enforce the prohibition of the first proviso to the sub-section, and the claimant having otherwise satisfied the conditions of the sub-section was entitled to an award. No question of onus arises.

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In this view I am of opinion that the first question of law should be answered in the negative, but that the second question should be answered in the affirmative.

I therefore propose that the appeal should be allowed, that the interlocutor appealed from should be recalled, that the questions of law should be answered as above suggested, and that the respondents should pay the appellant his costs of this appeal and in the Court of Session.

LORD MACMILLAN. I concur.

LORD ATKIN. I am asked to say that my noble and learned friend Lord Romer also concurs.

Appeal allowed.

Solicitors for appellant: *Raymonds, for Thomas J. Addly, S. S. C., Edinburgh, and William Thornton, Glasgow.*

Solicitors for respondents: *Jaques & Co., for Charles T. Nightingale, S. S. C., Edinburgh, and D. M. Hutchison & Dow, Glasgow.*

Considered. *Re COXEN.*
[1948] Ch 747

[PRIVY COUNCIL.]

J. C.* SIFTON APPELLANT ;
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Applied. In re
BOUVERIE, DECD.
[1952] 1 Ch. 400

Distinguished. In
re GAPE, DECD.
[1952] 1 Ch. 418

Distinguished. In
re GAPE, DECD.
[1952] 1 Ch. 743

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Canada—Will—Payments to be made to testator's daughter "only so long
"as she shall continue to reside in Canada"—Condition subse-
quent, void for uncertainty.*

A testator by his will devised and bequeathed his real and personal property to his executors upon trust to manage the corpus of the estate and to pay "to or for my said daughter [the appellant] a sum sufficient in their judgment to maintain her suitably until she is forty years of age, after which the whole income of the estate shall be paid to her annually. The payments to my said daughter shall be made only so long as she shall continue to reside in Canada."

Held, that the provision that the payments were to be made "only so long as she shall continue to reside in Canada" was a condition subsequent which was void for uncertainty.

Principle enunciated by Lord Cranworth in *Clavering v. Ellison* (1859) 7 H. L. C. 707, at p. 725, applied.

Judgment of the Court of Appeal for Ontario [1937] O. R. 654, reversed.

APPEAL (No. 20 of 1938) from a majority judgment of the Court of Appeal for Ontario (June 17, 1937) which had varied an order of the Supreme Court of Ontario (Middleton J.A.) (February 18, 1937) determining on an originating motion questions arising on the construction of the will of Clifford Winfield Burrows Sifton, who died on June 13, 1928.

The testator died leaving him surviving his widow, the respondent Mabel Cable Sifton, and the appellant, Elizabeth Arminella Burrows Sifton, his only child, who was thirteen years of age at the date of his death. His will (dated July 12, 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows: "I give, devise and

* *Present*: LORD THANKERTON, LORD ROMER, and SIR LANCELOT SANDERSON.

"bequeath all other property real and personal to my executors
 "upon the following trusts namely—To manage the corpus
 "of the estate in accordance with their best judgment
 "continuing any investments that exist at the time of my
 "death if they see fit and to pay to or for my said daughter
 "a sum sufficient in their judgment to maintain her suitably
 "until she is forty years of age, after which the whole income
 "of the estate shall be paid to her annually.

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"The payments to my said daughter shall be made only
 "so long as she shall continue to reside in Canada."

By the originating motion the surviving executors and trustees of the will, Clifford Sifton and Wilfred Victor Sifton, respondents to this appeal, sought in a number of questions the opinion, advice and direction of the Court as to the effect of the clause in the will providing for payments only so long as the appellant should continue to reside in Canada.

The facts and the relevant questions submitted to the Court upon the originating motion appear from the judgment of the Judicial Committee.

The only question argued before Middleton J.A., who heard the motion, was as to the meaning of the words "continue to reside in Canada," and he held that it was impossible for the Court to define with any accuracy what future conduct would fall within the terms of the will, and in his judgment as drawn up it was stated (*inter alia*) that the words "to reside in Canada" were equivalent to "spend "substantially all of her time in Canada," but that mere temporary absence from Canada in certain circumstances would not bring about a forfeiture of the daughter's interest in the estate.

Before the Court of Appeal the appellant raised the contention that it was impossible to tell with any certainty what she might do in the matter of absence from Canada without incurring the risk of losing her income under her father's will; and that the provision for cessation of the payment of that income was a condition subsequent, which was void for uncertainty. The respondent, the Official Guardian, was appointed on April 21, 1937, to represent

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the grandchildren of the testator's father, Sir Clifford Sifton, and also any unborn infants.

The Court of Appeal for Ontario (Rowell C.J.O., Latchford C.J., Fisher J.A., and Kingstone J., Henderson J.A. dissenting) declared that the clause was not void for uncertainty. They were of opinion (inter alia) that the words "to reside "in Canada" were equivalent to the words "to live in "Canada," but that leaving Canada for a limited period and for a purely temporary purpose, with the intention of returning to Canada, and actually returning when the temporary purpose was accomplished, would not be a breach of the condition. The appeal is reported at [1937] O. R. 654.

The short question in this appeal was whether the clause was a condition subsequent which was void for uncertainty.

1938. May 20, 23. *Cyril Radcliffe K.C.* and *Grant Gordon* for the appellant. The short point is whether the gift in the will is free from the limitation that the payments shall be made only so long as the appellant continues to reside in Canada, on the ground that the limitation, being a condition subsequent to the giving of the interest under the will, is void for uncertainty. The words, it is submitted, lack the necessary precision of language to enable the Court to know what conduct really is intended to take away the interest given to the appellant and to defeat her rights under the will in future. The gift has been made so that it has vested first, and then the testator has said that in a certain event the gift that has already been made shall cease to be received by the recipient. The condition is a condition subsequent. In *Clavering v. Ellison* (1) Lord Cranworth said (2): "Where "a vested estate is to be defeated by a condition on a "contingency that is to happen afterwards, that condition "must be such that the Court can see from the beginning, "precisely and distinctly, upon the happening of what event "it was that the preceding vested estate was to determine." That principle has been adopted again and again in subsequent

(1) 7 H. L. C. 707.

(2) Ibid. 725.

cases. Lord Cranworth thought that *Fillingham v. Bromley* (1) was a typical instance of a condition subsequent which was void for uncertainty. In the following cases the principle in *Clavering v. Ellison* (2) has been treated as the governing decision on the matter: *In re Sandbrook*. *Noel v. Sandbrook* (3); *In re Boulter*. *Capital and Counties Bank v. Boulter* (4); *In re Reich*. *Public Trustee v. Guthrie* (5); *In re Lanyon*. *Lanyon v. Lanyon* (6); *In re Borwick*. *Borwick v. Borwick* (7); and *In re Viscount Exmouth*. *Viscount Exmouth v. Praed*. (8) In the circumstances of the present case the Court is not able to judge which of the admittedly flexible meanings of the word "reside" or "residence" is the one which the testator intended to apply here. There is therefore the vagueness and uncertainty as to the event which is to forfeit the interest given which makes the condition of avoidance void.

The Court of Appeal were apparently led to make the declaration they did [see the judgment of the Judicial Committee] because a number of cases were cited to them turning on the effect of conditions with regard to residence, in which the Court had enforced such conditions so as to create forfeiture: *Walcot v. Botfield* (9); *Dunne v. Dunne* (10); *Wynne v. Fletcher* (11); *In re Moir*. *Warner v. Moir* (12); *In re Wilkinson*. *Page v. Public Trustee* (13); and *In re Geo. M. Ross*. (14) There has never been a case where the condition attached to a gift of the present nature has been as wide as a simple condition of residence in a country like Canada. When her father died the appellant was a child of thirteen years of age, without any property of her own, and therefore "continue to reside" cannot mean that she is to continue to keep up any defined place at all—she never had one. That in itself really takes the matter out of all the

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(1) (1823) Turn. & Russ. 530,
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(2) 7 H. L. C. 707, 725.

(3) [1912] 2 Ch. 471, 476-7.

(4) [1922] 1 Ch. 75, 82-3.

(5) (1924) 40 Times L. R. 398.

(6) [1927] 2 Ch. 264.

(7) [1933] 1 Ch. 657, 668.

(8) (1883) 23 Ch. D. 158, 165.

(9) (1854) Kay, 534, 542.

(10) (1855) 3 Sm. & G. 22;
7 De Gex M. & G. 207, 211-12.

(11) (1857) 24 Beav. 430, 434.

(12) (1884) 25 Ch. D. 605.

(13) [1926] Ch. 842, 847-8.

(14) (1904) 7 O. L. R. 493, 495.

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cases relied upon in the Court of Appeal as to residence. It must, therefore, mean in the vaguer sense of continuing to retain connection of a residence in Canada, and, once it has that wider residential qualification, one gets into an area where the language is imprecise, and the condition is void for uncertainty. If the condition must be construed strictly, it is impossible to construe strictly what is imprecise in its meaning. It is not sufficient to find an intention in a condition subsequent; one must be sure what the testator meant from the start.

G. P. Slade for the respondent the Official Guardian, on behalf of grandchildren of the late Sir Clifford Sifton, the testator's father, and any unborn issue. The condition should be upheld. It is not a condition subsequent. It is either a condition precedent, or a provision which is a term of the gift and upon which the gift is dependent. If there be doubt whether upon the true construction of a will a condition is precedent or subsequent it is admitted that the Court will lean towards construing it as subsequent—that is founded on the rule that the Court leans in favour of early vesting. In this case until the appellant is forty years old there is nothing in the nature of a vested gift at all. The whole scheme of the trust is quite different from that of a vested gift. The appellant does not take a vested interest before she is forty years old, and therefore the condition cannot be a condition subsequent. There is merely a direction for a series of periodical payments, the right to make and receive which is dependent upon her continuing to reside in Canada, and that is a condition precedent. If the Board does not accept that view, then it is submitted that it is more like a limitation than a condition; it is really a direction to pay to the appellant until she shall cease to reside in Canada. If that be the true meaning, then the whole gift is simply a direction to make certain payments to a beneficiary until a certain event, and *In re Wilkinson*. *Page v. Public Trustee* (1) establishes that that is sufficient to distinguish the case from the line

of cases beginning with *Clavering v. Ellison*. (1) *Wilkinson's* case (2) is a very close analogy to the present case. There is no difficulty in giving effect to this condition, whatever view be taken of its nature, if the words "reside in Canada" are construed as being substantially equivalent to "ordinarily resides": *Levene v. Inland Revenue Commissioners*. (3) [Reference was also made to *In re Lanyon*. *Lanyon v. Lanyon* (4), and *Re Talbot-Ponsonby's Estate*. *Talbot-Ponsonby v. Talbot-Ponsonby*. (5)] *Clavering v. Ellison* (1) cannot be taken as an authority for the general proposition that a condition, even a condition subsequent, requiring residence, is too uncertain to be enforced: *Re Talbot-Ponsonby's Estate*. (5) In the present case "continues to reside" means to make her ordinary home within the Dominion of Canada. Temporary absence is fully recognized as within the meaning of this condition, and the question is, when does a temporary absence become more than that: that is the real difficulty in this case, and the question of degree is at once involved.

All that *Fillingham v. Bromley* (6) decided was that there was no forfeiture in that case. The line of cases of which *Walcot v. Botfield* (7) is one, shows that, where a condition as to residence, even a condition subsequent, is attached to a gift, the Court has not regarded that as being too uncertain so as to be incapable of enforcement. There is a large number of cases in which conditions subsequent as to residence have come before the Courts and the conditions have been upheld: *Dunne v. Dunne*. (8) All the appellant here has to do is to make Canada her principal place of abode: *Wynne v. Fletcher*. (9) The word "residence" is one to which the Courts can give a recognized meaning. It is submitted that without in the least departing from the principle in *Clavering v. Ellison* (1) the Board should say that the testator has used a word of recognized legal meaning, and that when he says "continues to reside" he means continue to make

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(2) [1926] Ch. 842.

(3) [1928] A. C. 217, 222, 225.

(4) [1927] 2 Ch. 264.

(5) [1937] 4 All E. R. 309.

(6) Turn. & Russ. 530.

(7) Kay, 534.

(8) 7 De Gex M. & G. 207, 212.

(9) 24 Beav. 430.

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her usual or ordinary place of abode within the Dominion of Canada. The testator must have contemplated some kind of absence. None of the judges in *Wemyss v. Wemyss's Trustees* (1) felt any difficulty with regard to the condition in that case being uncertain by reason of the word "reside." [Reference was also made to *In re Wright*. *Mott v. Issott* (2); and *In re Boulter*. *Capital and Counties Bank v. Boulter*. (3)] Upon the true construction of this will the condition is not a condition subsequent, but is either a condition precedent or a term of the gift. If either of those two constructions is correct, the principle of *Clavering v. Ellison* (4) has no application. If, on the other hand, that principle has to be applied, it can be held without in any way departing from it that this condition is a valid one by construing it as requiring the appellant to make her ordinary place of abode within the Dominion of Canada. If there is a forfeiture once, it must be a forfeiture once and for all.

Hon. Charles Russell for the respondent executors. If the Board should uphold the validity of this condition or limitation, the executors hope that so far as possible definite directions may be given to cover at least part of the specific questions which were put to them by the appellant and by them to the Court. The executors take no side, and submit to act as directed. [Reference was made to *Balfour's Trustees v. Johnston* (5), where *Wemyss v. Wemyss's Trustees* (1) was considered; and to *Jarman on Wills*, 7th ed., vol. ii., p. 1523, where *Auld v. Pinney* (6) is referred to.]

Cyril Radcliffe K.C., replying, was not required to deal with the argument that the condition was a condition subsequent.

With regard to "residence," the only cases in which there appears to be some qualification on the principle laid down by Lord Cranworth in *Clavering v. Ellison* (4) are *In re Wilkinson*. *Page v. Public Trustee* (7); *In re Lanyon*.

(1) 1921 S. C. 30, 36, 40, 43.

(2) [1907] 1 Ch. 231.

(3) [1922] 1 Ch. 75.

(4) 7 H. L. C. 707.

(5) 1936 S. C. 137, 145.

(6) (1910) 54 Sol. J. 399.

(7) [1926] Ch. 842.

Lanyon v. Lanyon (1); and *Re Talbot-Ponsonby's Estate* (2); but it is submitted that they introduce no qualification relevant to this case. In each of those cases the judge said plainly that as a matter of construction he felt no difficulty in seeing clearly what the words of the condition meant. In the present case it is impossible to know what it is that the testator required the beneficiary to do in Canada. There are only two sufficiently precise meanings that can be given to the words in the will: (a) Never to set foot outside the geographical limits of Canada; and (b) Always to keep some place of residence in Canada. It is impossible to choose between those two; it becomes a pure question of the appellant's intention.

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June 24. The judgment of their Lordships was delivered by LORD ROMER. This is an appeal from a judgment of the Court of Appeal for the Province of Ontario which varied a judgment of Middleton J.A., given upon an application by way of originating motion brought by the respondents, Clifford Sifton and Wilfred Victor Sifton, the surviving trustees of the will of Clifford Winfield Burrows Sifton, deceased. By the motion the trustees sought the opinion, advice and direction of the Court on certain questions arising in the administration of that testator's estate.

The testator died on June 13, 1928, leaving him surviving his widow, the respondent Mabel Cable Sifton, and his daughter and only child, the appellant, who was then of the age of thirteen years.

The will (dated July 12, 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows: "I give, devise and bequeath all other property real "and personal to my executors upon the following trusts "namely—To manage the corpus of the estate in accordance "with their best judgment continuing any investments that "exist at the time of my death if they see fit and to pay to "or for my said daughter a sum sufficient in their judgment

(1) [1927] 2 Ch. 264.

(2) [1937] 4 All E. R. 309.

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“to maintain her suitably until she is forty years of age, after
“which the whole income of the estate shall be paid to her
“annually.”

But the will then proceeded as follows : “ The payments
“to my said daughter shall be made only so long as she shall
“continue to reside in Canada.”

The principal question arising upon this appeal is whether this last mentioned direction is not void for uncertainty. No light is thrown upon this question by the remainder of the will, which merely provided that, if the appellant should die leaving issue, her children should receive the whole estate in equal shares on attainment respectively by each child of the age of twenty-five years, but that, if the appellant should die leaving no issue, the corpus of the estate should be divided equally between the then living grandchildren of the testator's father, Sir Clifford Sifton, by the testator's mother, the late Lady Elizabeth Sifton. The will contained no express direction as to what was to happen to the income of the estate during the rest of the appellant's life after she should have ceased to “reside in Canada.”

The testator is stated in the evidence to have been “domiciled” in England during the years 1915 to 1925, but to have returned to Canada in the last mentioned year with his daughter, and to have taken up his residence (presumably with her) at Assiniboine Lodge, in the County of Leeds, Ontario, where he continued to reside, except for temporary absences on business or pleasure, until his death in 1928. After the death of her father the appellant appears to have remained in Canada continuously until the month of October, 1934, during the latter part of which period she was taking a course in modern languages at the University of Toronto. This course provided an option to take the third year thereof by travelling abroad, and the appellant accordingly spent the period between October, 1934, and September, 1935, in European countries, travelling and studying for the purpose of completing her education. Thereafter she returned to Canada, where she has remained down to the present time. Since June, 1936, she has maintained an apartment of her

own, which she has taken on lease and fully furnished, in the City of Montreal. In February, 1937, however, she was desirous of going abroad again for the purpose of study and travel, but very naturally was anxious to know to what extent she could gratify that desire without any risk of it being held that she did not "continue to reside in Canada" within the meaning of the will. It was in these circumstances that the respondent trustees issued their originating motion for the determination by the Court of certain specific questions. The first five of these questions illustrate so well the difficulties that arise in trying to ascertain the meaning of the words "continue to reside in Canada" that it is worth while setting them out in full. They were as follows:—

"(a) In the event of Elizabeth Arminella Burrows Sifton maintaining a residence in Canada but temporarily going abroad (out of Canada) for the purpose of travelling and/or studying for a period not exceeding eleven months and returning to Canada thereafter, would the said Elizabeth Arminella Burrows Sifton during her temporary absence from Canada 'continue to reside in Canada' within the meaning of the words 'continue to reside in Canada' as used in said will?

"(b) If the answer to question (a) be in the affirmative, could Elizabeth Arminella Burrows Sifton after a lapse of not less than one month again go abroad under similar circumstances and similarly 'continue to reside in Canada'?

"(c) In the event that Elizabeth Arminella Burrows Sifton so temporarily goes abroad for a period of eleven months should constitute a failure on her part to so 'continue to reside in Canada' may Elizabeth Arminella Burrows Sifton absent herself from Canada for any period under any circumstances and still so 'continue to reside in Canada' and if so, for what periods and under what circumstances may she so absent herself?

"(d) Is the purpose for which Elizabeth Arminella Burrows Sifton absents herself from Canada material to the question of whether or not she so 'continues to reside in Canada'?

"(e) If the answer to question (d) be in the affirmative

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"I. Is any temporary purpose sufficient ?

"II. If the answer to (e) I. be in the negative, what purposes would be sufficient ?

"III. If intention be material, would the written statement of Elizabeth Arminella Burrows Sifton of her intention delivered to the executors of said estate sufficiently evidence said intention ? "

The motion in due course came on for hearing before Middleton J.A., the appellant being the only respondent to the motion. The only question argued before him was as to the meaning of the words "continue to reside in Canada." (1) The point that such words were void for uncertainty was not raised on that occasion.

On February 18, 1937, the learned judge delivered judgment. In the course of it, after referring to the contention, at that time being advanced by the appellant, that the will only required her to maintain a residence in Canada, and that so long as she maintained such a residence she was at liberty to spend as much of her time outside Canada as she thought fit, he continued as follows (2): "After very careful consideration, I am of opinion that the testator contemplated "a far more restricted meaning to this clause of his will than "the daughter apparently thinks. I agree with her that a "merely temporary absence from Canada for the purpose of "education or travel will not bring about a forfeiture. The "absence during 1934 and 1935 was for such a temporary "purpose and, I think, worked no forfeiture, but it is "impossible to say that an absence during each of the following "years for eleven months in the year will not bring a forfeiture. "That would, I think, work a forfeiture, unless the executors "are satisfied that any particular trip or extended period of "residence abroad is in good faith for the purpose of completing her education. It is impossible for the Court to "define with any accuracy what future conduct will fall "within the terms of the will."

Later he added these words (3): "The questions as

(1) [1937] O. R. 654.

(2) Ibid. 657.

(3) Ibid. 658.

“propounded in the notice of motion do not admit of
“categorical answers.”

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In the judgment as drawn up, however, an attempt was made to give the executors somewhat more specific directions. It was, so far as material, in these terms :—

“1. This Court doth declare that the true intent, meaning
“and construction of the clause, ‘ The payments to my said
“‘ daughter shall be made only so long as she shall continue
“‘ to reside in Canada ’ used in the said last will and testament
“is :—

“(a) That the words ‘ to reside in Canada ’ are equivalent
“to ‘ spend substantially all of her time in Canada ’ but
“that mere temporary absences from Canada in certain
“circumstances would not bring about a forfeiture of the
“interest of the said daughter in the estate.

“(b) That any and all absences of the said daughter
“from Canada not exceeding two calendar months in the
“aggregate on one or more occasions during any one
“calendar year, or not exceeding two calendar months on
“one continuous occasion and one additional calendar
“month on one or more additional occasions in one calendar
“year, be in all events incapable of constituting a failure
“to continue to reside in Canada. . . .

“(c) That the absence of the said daughter from Canada
“abroad between October, 1934, and September, 1935,
“does not work a forfeiture of such interest.

“(d) That an absence from Canada for a period of eleven
“months during the next two or three years will work a
“forfeiture of such interest unless the executors are
“satisfied it is in good faith for the purpose of completing
“the education of the said daughter.

* * * * *

“2. And this Court doth further order and adjudge that the
“questions propounded in the notice of motion do not now
“admit of categorical answers but the parties may apply to
“this Court from time to time, as circumstances arise, for the
“advice, opinion and direction of the Court on the matters in
“question,”

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Their Lordships realize to the full the difficulty of construing the words in question. But, with all respect to Middleton J.A., they cannot feel that his solution of the difficulty is a satisfactory one. It merely introduces further difficulties of construction. What, for instance, is the meaning to be attributed to the words "substantially," "temporary" and "certain circumstances" in sub-para. (a) of the declaration? Sub-para. (b) was no doubt added for the purpose of indicating what the learned judge meant to indicate by the word "temporary," and that sub-paragraph, and those lettered (c) and (d), may be regarded as intended to throw some light upon the expression "certain circumstances." But the indication contained in sub-para. (b) that absences from Canada for three calendar months in the aggregate on one or more occasions during any one calendar year are not, or may not be, permissible when no one absence is a continuous one for two calendar months, yet are permissible if one of such absences is a continuous one for two calendar months, only adds to the difficulty of construing the word "temporary." Sub-para. (b), moreover, covers absences for the periods therein mentioned under all circumstances and for any purpose, whereas sub-paras. (c) and (d) are dealing with absences for the purpose of completing the appellant's education. But when (if ever) a person's education can be said to be completed is not an easy matter to determine. It is further to be observed that the judgment as drawn up in no way refers to any obligation upon the appellant to maintain a residence in Canada, though in giving his decision the learned judge had said (1) : "The word 'residence' is an elastic word ; 'it takes colour from the context in which it is used. Here 'it means an actual permanent residence, a home. It will 'not cease to be a residence by reason of mere temporary 'absence.'" Whether or not he considered the maintenance of a house or other place of residence to be obligatory is therefore left in some doubt.

But the learned judge had plainly stated that it was impossible to define with any accuracy what future conduct

(1) [1937] O. R. 657.

would fall within the terms of the will, and, although the judgment was a meritorious attempt to assist the parties, it abundantly confirmed the truth of that statement.

On March 5, 1937, the appellant issued a notice of appeal from the judgment of Middleton J.A. to the Supreme Court of Ontario, inviting that Court to disagree with the construction placed by the learned judge upon the words in question. But on April 8, 1937, having presumably by that time come to the conclusion that the learned judge was right in his view as to the impossibility of defining the words with any accuracy, the appellant gave notice of her intention of submitting upon the hearing of the appeal that the clause containing the words was a condition subsequent, and as such was void for uncertainty. She had, in other words, determined to avail herself, if possible, of the principle enunciated by Lord Cranworth in *Clavering v. Ellison*. (1) In that case a testator devised his real estate to the children of his son for what were held to be vested equitable estates in tail liable to be divested on breach of a condition subsequent. The condition was in these terms (2): "Provided farther, and "I do hereby declare that the devises hereinbefore contained "to the children of my said son, are made upon this express "condition, that the children of my said son be educated in "England and in the Protestant religion according to the rites "of the Church of England, and in case any one or more of "such children shall be educated abroad, or not in the "Protestant religion according to the rites of the Church of "England, then I do hereby revoke all and every devise to "such child or children so educated as aforesaid." Questions having arisen whether there had been a breach of this condition subsequent in the case of some of the son's children, the matter ultimately came before the House of Lords. It was held by Lord Campbell L.C. that the condition had not in fact been broken. Lord Cranworth agreed with the Lord Chancellor that there had been no breach of the condition as to the children being educated in the Protestant religion. But he did not find it necessary to come to any

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(1) 7 H. L. C. 707.

(2) Ibid. 709.

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definite conclusion upon the question whether the children had in fact been educated abroad, as he held the condition to be void for uncertainty. He said (1):—

“I consider that, from the earliest times, one of the cardinal “rules on the subject has been this : that where a vested estate “is to be defeated by a condition on a contingency that is to “happen afterwards, that condition must be such that the “Court can see from the beginning, precisely and distinctly, “upon the happening of what event it was that the preceding “vested estate was to determine.

“In my opinion, if there was no direct authority for it, I “should still have arrived at the same conclusion ; but I have “looked at the authorities, especially that of Lord Eldon “in the case of *Fillingham v. Bromley*. (2) I think that, “looking at the language here used, it is far too indefinite “and uncertain to enable the Court to say what it was that the “testator meant should be the event on which the estate was “to determine.”

Then, after giving instances in which it would be difficult to say whether a child had or had not been educated abroad, he added this (3) : “But the question is, not whether in the “particular case he was educated abroad, but whether you can “predicate on reading the will, what it was that was to defeat “the vested estate ? I concur in Lord Eldon’s observations “about an estate being defeated by a person not living and “residing in a particular house, which he thought too remote ; “and I think that this is far more remote than that.”

Much to the same effect has been said in later cases, of which it will be sufficient to mention three. In *In re Sandbrook*. *Noel v. Sandbrook* (4) Parker J. stated the principle in these words : “conditions subsequent, in order to defeat vested estates, or “cause a forfeiture, must be such that from the moment of “their creation the Court can say with reasonable certainty “in what events the forfeiture will occur.”

In *In re Viscount Exmouth*. *Viscount Exmouth v. Praed* (5)

(1) 7 H. L. C. 725.

(2) Turn. & Russ. 530.

(3) 7 H. L. C. 726.

(4) [1912] 2 Ch. 471, 477.

(5) (1883) 23 Ch. D. 158, 164.

Fry J. used the following language : "the condition must be "clear and certain. That, in my opinion, includes, not only "certainty of expression in the creation of the limitation, but "also certainty in its operation. It must be such a limitation "that, at any given moment of time, it is ascertainable whether "the limitation has or has not taken effect."

These words of Fry J. were considered by Russell J. in *In re Lanyon. Lanyon v. Lanyon*. (1) He said (2): "They do "not, I think, mean that the person affected must be in a "position at all times to know whether he is committing a "breach of a provision the nature of which is clearly expressed."

Their Lordships respectfully agree. If the provision be clearly expressed, it is the fault or the misfortune of the person affected if he should fail to know whether he is committing a breach of it. But this is implied in the language used by Fry J. He said that it must be "ascertainable" whether the provision has taken effect or not; not that it must be ascertained in fact by the person affected, or even ascertainable by him without difficulty.

In the particular case with which Russell J. was dealing the condition was that a person should not marry a relation by blood. The learned judge held the condition to be void as tending to the prohibition of marriage altogether. He declined, however, to hold it void for uncertainty, inasmuch as he considered the meaning of blood relationship to be clear enough. If the words included the whole of the human race, the person affected by the condition would know that any and every marriage would cause a forfeiture, and the condition, though bad on other grounds, would not be void for uncertainty. If, however, they did not include the whole human race, and presumably they could not have been intended to do so, the testator had failed to specify the number of generations in which no common ancestor of the spouses was to be found; and, in their Lordships' opinion, and with all respect to the learned judge, the condition might on that ground have been held to be void for uncertainty. Had any particular number of generations been specified,

(1) [1927] 2 Ch. 264.

(2) Ibid. 269.

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the fact that it might be difficult to ascertain whether or not there was a common ancestor in such generations would not, their Lordships respectfully agree, have rendered the condition void. For whether there was such a common ancestor or not would necessarily be ascertainable, if the search were sufficiently diligent.

In the present case the appellant raised the contention before the Court of Appeal that it is impossible to tell with any certainty what she may do in the matter of absence from Canada without incurring the risk of losing her income under her father's will; and that the provision for cessation of payment of that income is a condition subsequent, which, in accordance with the principle laid down in the cases to which reference has been made, is void for uncertainty.

In view of this contention on her behalf the Official Guardian had, on April 21, 1937, been appointed to represent the grandchildren of the late Sir Clifford Sifton, mentioned in the will, and also any unborn infants. It had also been ordered that the widow of the testator might be represented at the hearing of the appeal. She did not, however, avail herself of this order—nor was she represented at the hearing before their Lordships.

The appeal came on for hearing on June 17, 1937, before Rowell C.J.O., Latchford C.J., Fisher and Henderson J.J.A. and Kingstone J. In the result it was dismissed (Henderson J.A. dissenting), though the Court varied the judgment of Middleton J.A. in manner indicated later.

The learned Chief Justice of Ontario was of opinion that there is nothing uncertain or ambiguous about the words "to reside in Canada." The words "to reside," he said, have a clear and definite meaning. They mean to live in a place. But he agreed that a person residing in Canada does not cease to reside or to live in Canada because he goes abroad occasionally for business or pleasure. An unmarried woman, he said, having no actual residence of her own in Canada, and having no profession or occupation to which she is devoting her life in Canada, may be said to be residing wherever she is living for the time being. If such a person, he said, left

Canada, save for a limited period for a purely temporary purpose, a Court might conclude that she had ceased to reside in Canada. He did not, however, say what would be a "limited" period, or what would be a "purely temporary" purpose. He added, indeed, that whether or not the appellant had at any time ceased to reside in Canada would be a question of fact, which would have to be determined in view of all the circumstances. Latchford C.J. said that he agreed in substance with the Chief Justice of Ontario. But he, too, refrained from indicating with any precision what were the obligations imposed upon the appellant by the condition in question. He did not think that the Court could at present be properly called upon to decide how long, or what was the period for which, Miss Sifton might absent herself from Canada without infringing the restriction imposed upon her as to residing in Canada. If that question should arise at any time, the executors, he said, must apply their judgment to it whatever the consequences. Fisher J.A. (according to the report of his judgment supplied to their Lordships) said that what the word "reside" means, and what the testator meant it to mean, was that his daughter must live in Canada and make Canada her permanent place of abode. The word "permanent," however, would appear to be a clerical error in the report for "principal." For he agreed with the other members of the Court that absence from Canada would be permissible for definite and particular purposes, and for definite periods of time. But he, too, refrained from indicating with precision either the purposes or the periods that would be permissible. It is, he said, always a question of fact for the executors to determine before making payments of income, to satisfy themselves that the daughter has up to that time resided and continued to reside in Canada. Kingstone J. said that on the argument he was of opinion that the words "so long as she shall continue to reside in Canada" were so indefinite and uncertain as to be incapable of being properly and satisfactorily determined, but that on further reflection he thought the words "to reside in Canada" must be held to mean what they say, "to live in a place," namely, Canada.

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But he added that it might well be that when certain events (which he did not specify) happened there would be difficulty in saying whether or not they fell within the proviso in the will, but that that was not a matter with which the Court were then concerned, or on which it should attempt to express itself. Henderson J.A. dissented. He was of opinion that the clause in question was a condition subsequent, and was void for uncertainty on the principle enunciated in *Clavering v. Ellison*. (1)

By the order of the Court of Appeal as drawn up the judgment of Middleton J.A. was varied, and as varied was ordered to be as follows :—

“1. This Court doth declare—

“(1.) That the clause or condition ‘The payments to my said daughter shall be made only so long as she shall continue to reside in Canada,’ used in the said last will and testament, is not void for uncertainty.

“(2.) That the true intent, meaning and construction of the said clause or condition is that the words ‘to reside in Canada’ are equivalent to ‘to live in Canada.’

“(3.) That leaving Canada for a limited period and for a purely temporary purpose with the intention of returning to Canada and actually returning when the temporary purpose is accomplished, would not be a breach of the condition.

“(4.) That the absence of the said daughter from Canada abroad between October, 1934, and September, 1935, pursuing her studies as part of her University course, does not work a forfeiture of such interest.

“And doth order and adjudge the same accordingly.

“2. And this Court doth further order and adjudge that the questions propounded in the Notice of Motion do not now admit of categorical answers but the parties may apply to this Court from time to time, as circumstances arise, for the advice, opinion and direction of the Court on the matters in question.”

With the greatest respect to the majority of the Court of

Appeal, their Lordships are unable to agree with their decision. If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of Lord Cranworth, the Court and, their Lordships venture to add, the parties concerned, can see from the beginning precisely and distinctly upon the happening of what events it is that the payments to the appellant are to cease. (1) In their Lordships' opinion, it is impossible to define these events precisely or distinctly. Henderson J.A. said that a cogent argument for this conclusion was furnished by the statement of Middleton J.A. in the Court below, that it was impossible for the Court to determine with any accuracy what future conduct would fall within the terms of the will. Their Lordships agree. But they also venture to think that equally cogent arguments are to be found in the reasons of the majority of the Court of Appeal, and in the formal judgment of that Court. None of those learned judges defined or attempted to define precisely or distinctly the events that would constitute a ceasing on the part of the appellant to reside in Canada. Had they attempted to do so they must, in their Lordships' judgment, have failed, because they would have been attempting the impossible.

Their Lordships' attention was called during the arguments to numerous authorities in which the Court has been called upon to consider the meaning of the words "reside" and "residence," and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word "reside" means something different from either being in residence or merely maintaining a

(1) 7 H. L. C. 725.

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residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that so long as she maintained a residence in Canada she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately, he omitted to define either the purposes or the periods. The result is that the majority of the Court of Appeal have found themselves unable to give any more precise direction than that the appellant may leave Canada for a limited period and for a purely temporary purpose, without being able to define either the word "limited" or the word "temporary." It necessarily followed that they, in common with Middleton J.A., were of opinion that the questions propounded in the trustees' notice of motion do not at present admit of categorical answers. Their Lordships are of the same opinion. But if the appellant's interest under the will is to be forfeited upon her "ceasing to reside in Canada," she has a right to have those questions categorically answered; and inasmuch as they cannot be so answered, the words, if constituting a condition subsequent, are void for uncertainty.

It only remains to consider whether the words in question are a condition subsequent. As to this their Lordships feel no doubt. Henderson J.A. was of opinion that the words constituted a condition subsequent, and in this, as in other respects, their Lordships agree both with his conclusions and the reasons he gave for them. Where it is doubtful whether a condition be precedent or subsequent the Court *prima facie* treats it as being subsequent. For there is a presumption in favour of early vesting. It was said on behalf of the Official Guardian that even without the condition the appellant took no vested interest in the income of the testator's estate accruing between his death and the time she attains the age of forty years. But, however this may be, the appellant, apart from the condition, would plainly take a vested life interest in the estate as from that time. The condition must therefore be treated as a condition subsequent so as not to interfere

with the vesting of that interest. It was further contended on behalf of the Official Guardian that the words in question merely limit the duration of the trust for payment, and are not in the nature of a condition at all. But the trusts for payment to the appellant are quite distinct from the words with which their Lordships are concerned, and which are in a separate clause. These words do not, in their opinion, qualify the trusts for payment. They are merely designed to abrogate the trusts in a certain event. In substance, no doubt, there is not much difference between a trust to pay until the happening of a certain event, and a trust to pay that is abrogated on the happening of that event. But the legal effect in the two cases of the event being described with insufficient certainty are widely different. In the first case the trust will fail altogether. In the second case the trust will remain, and it will be the clause of abrogation that will fail.

For these reasons their Lordships are of opinion, and will humbly advise His Majesty, that this appeal should be allowed; that the judgment of Middleton J.A., as varied by the Court of Appeal, should be set aside except in so far as it dealt with the costs of the hearing of the motion and of the appeal; and that a declaration should be made that the clause in the will of the testator directing that the payments to the appellant should be made only so long as she continues to reside in Canada is void for uncertainty.

The costs of all parties represented on this appeal, those of the respondent trustees and the Official Guardian as between solicitor and client, should be paid out of the estate of the testator.

Solicitors for appellant : *Lee & Pembertons.*

Solicitors for the Official Guardian : *Blake & Redden.*

Solicitors for the respondent executors : *Charles Russell & Co.*

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[PRIVY COUNCIL.]

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 June 30 ; AND
 July 25. STRICKLAND RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

Malta—Grant of representative institutions by Letters Patent—Revocation—Crown's prerogative to legislate subsequently by Letters Patent—Acquisition by voluntary cession—Malta Letters Patent, August 12, 1936—Temporary Additional Duties Ordinance, No. XXVII. of 1936—Constitutional validity.

Although Malta was acquired by the Crown by voluntary cession by the inhabitants, there is no ground for distinguishing such cession from cases of cession from a sovereign power so far as concerns the prerogative right of the Crown to legislate by Letters Patent or Orders in Council for the ceded colony.

The Malta Constitution Letters Patent of 1921, as subsequently amended, which provided for the establishment of representative institutions for Malta, were revoked, pursuant to the powers conferred by s. 1 of the Malta (Letters Patent) Act, 1936, by Letters Patent of August 12, 1936, which also provided by s. 15 that the Governor "may make laws for the peace, order and "good government of Malta." The Governor, in exercise of his powers thereunder, having made Ordinance No. XXVII. of 1936, which imposed customs duties on certain foreign articles imported into Malta :—

Held, that the royal prerogative was not so far extinguished when the Letters Patent of 1921 granting responsible government were issued that, after they were revoked, the prerogative did not exist, and therefore the Letters Patent of 1936 and Ordinance No. XXVII. passed in pursuance thereof were *intra vires* and legally enforceable.

Campbell v. Hall (1774) 1 Cowp. 204, discussed and explained.

As a general rule a grant of representative institutions without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist.

Judgment of the Court of Appeal of Malta reversed.

APPEAL (No. 31 of 1938) from a judgment of the Court of Appeal of Malta (March 4, 1938) reversing a judgment of the Civil Court of Malta, First Hall (October 11, 1937).

On April 19, 1937, the respondent, the Hon. Mabel

* *Present* : LORD MAUGHAM L.C., VISCOUNT SANKEY, LORD ATKIN, LORD WRIGHT, and SIR SIDNEY ROWLATT.

Strickland, as attorney for her father, Lord Strickland, instituted proceedings against the appellants, Edgar Sammut, a Collector of Customs, Malta, and Sir Harry Luke, Lieutenant-Governor of Malta, for a refund of 2s. 9d. paid under protest in respect of customs duties imposed on certain articles imported into Malta by the Temporary Additional Duties Ordinance, No. 27 of 1936, enacted by the Governor of Malta under powers purported to have been conferred by the Malta Letters Patent of August 12, 1936, which by s. 15 provided that "The Governor may make laws for the peace, order, and good government of Malta." The respondent contended (*inter alia*) that owing to the circumstances in which Malta became part of the British Empire—by voluntary cession or compact—there was no power in the Crown on that date to provide by Orders in Council or by Letters Patent for the government of Malta, or to confer on the Governor any powers to make the Ordinance in question, and that the Letters Patent of August 12, 1936, which, pursuant to the powers given by s. 1 of the Malta (Letters Patent) Act, 1936, revoked the Malta Constitution Letters Patent, 1921, as amended, which had granted representative institutions to Malta to deal with local matters, were *ultra vires*, and that Ordinance No. 27 of 1936, made thereunder, was not enforceable.

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The Court of First Instance held that Malta must be regarded as a colony acquired by cession; that a ceded colony is by the common law prerogative of the Crown subject to legislation by Orders in Council or Letters Patent; that after the revocation of the Letters Patent of 1921 the rights of the Crown reverted to the position which had existed immediately before the Letters Patent of 1921 were issued, and that as the result of the revocation the royal prerogative as regards legislation was fully restored, and that the Letters Patent of August 12, 1936, were accordingly valid.

The Court of Appeal held (*inter alia*) on the authority of *Campbell v. Hall* (1) that by the grant of representative institutions by the Letters Patent of 1921, without reserving

(1) 1 Cowp. 204.

J. C. a power of revocation, the royal prerogative was irrevocably
 1938 surrendered ; that the revocation of the Letters Patent of 1921
 SAMMUT by the Letters Patent of August 12, 1936, by virtue of s. 1
 v. of the Malta (Letters Patent) Act, 1936, was insufficient to
 STRICKLAND. restore the prerogative right to legislate or to confer a new
 right, since that section did not contain any words conferring
 a right to legislate after the revocation, and they accordingly
 held that the Letters Patent of August 12, 1936, were
 invalid.

1938. June 21, 23. *Sir Donald Somervell A.-G., Kenelm
 Preedy, and John Foster* for the appellants. The important
 words of the Temporary Additional Duties Ordinance, No. 27
 of 1936, are " Be it enacted by the Governor of Malta. . . ."
 The Governor derived power to enact that Ordinance under the
 Letters Patent of August 12, 1936, the validity of which is
 contested by the respondent. Those Letters Patent of 1936,
 in pursuance of the power given by s. 1 of the Malta (Letters
 Patent) Act, 1936, revoked the Malta Constitution Letters
 Patent of 1921 which had provided for representative
 institutions, and provided in s. 15 that " The Governor may
 "make laws for the peace, order, and good government of
 "Malta." The important point about the Letters Patent
 of 1921 is that when they were originally issued, and at all
 material times before the Malta (Letters Patent) Act, 1936,
 the Crown had only a limited power of revocation : s. 68.
 The question is whether after the revocation of the Letters
 Patent of 1921 the Crown had power to legislate for Malta
 by Letters Patent. The effect of the Act of 1936 is as if
 complete power of revocation had been in the Letters Patent
 of 1921 from the beginning. The respondent contends that
 the common law prerogative of the Crown to legislate by
 Orders in Council or Letters Patent for the government of a
 Colony is restricted to Colonies acquired by conquest or
 cession, and that Malta was not acquired either by conquest
 or cession. Overseas possessions of the Crown are divided
 in law into two broad categories—those acquired by conquest
 or cession, and those acquired as settlements. Settlements

are places to which His Majesty's subjects have resorted in which there is no civilized Government: preamble to the British Settlements Act, 1887 (50 & 51 Vict. c. 54). It is submitted that Malta cannot be said to be a British Settlement, and the Crown did not purport to proceed under the British Settlements Act. Whatever view may be taken of the complicated historical facts which led up to the acquisition of Malta by the British it is contended that British sovereignty over Malta was in law acquired by cession.

From about 1540 till 1798 Malta was governed by the Knights of Malta, who obtained it from Charles V. of Spain in 1540, and the King of the Two Sicilies retained suzerainty over the Island. In 1798 it was captured from the Knights of Malta by Napoleon on his way to Egypt. The Maltese disliked the French rule and revolted in 1798, when they besieged the French in Valletta. That was just after the defeat of the French fleet by Nelson at Aboukir. The British fleet blockaded Valletta, and land and sea operations went on for about two years, until 1800. By that time British troops, as well as those of the King of the Two Sicilies, had been landed on the Island. In 1802 the French surrendered to the Commander-in-Chief of the British troops. After the French had capitulated, a Civil Administrator was appointed by the British Crown, and the British treated themselves, rightly or wrongly, as in a position to dispose of the Island. In 1813 a Governor was appointed and British sovereignty was claimed by the Governor with the full assent of the Maltese, and in 1813 the Maltese became British subjects. In 1814, by the Treaty of Paris, Great Britain's sovereignty over Malta was recognized by the French, and in 1815, by the Congress of Vienna, it was recognized by the King of the Two Sicilies. It was a complicated position, but it is contended that whatever view one takes Malta was acquired by cession to the Crown, either on the ground that it was ceded under the Treaty of Paris, 1814, or on the ground that it was a voluntary cession of the Maltese people.

The respondent's first point is that the Crown never has had, and does not now possess, any power to legislate for

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Malta except with the aid of a representative Legislature. That is based on the respondent's submission that Malta was not acquired by cession. The respondent, it appears, concedes that if Malta was acquired by cession, then the Crown under its prerogative has full power to provide for the government of the ceded territory unless it has divested itself of that power on what is normally referred to as the principle laid down in *Campbell v. Hall*. (1) If territory is acquired by cession, the Crown has the right by Order in Council to deal with the government as it likes. The respondent says that, as Malta was not acquired by cession, the Crown never had any power to provide for the government of Malta except by conferring on it representative institutions.

The respondent further contends that where the Crown has in pursuance of its prerogative powers granted to a Colony representative institutions without reserving a power of revocation, the grant is irrevocable; that no power of revocation or amendment is impliedly reserved, and that subsequent Orders in Council or Letters Patent purporting expressly to give the Crown a power of revocation, or purporting in effect to revoke the grant, are ultra vires; and *Campbell v. Hall* (1) is cited as an authority for that principle. That case dealt, it is submitted, with a somewhat different and narrower issue. The basis of the rule in *Campbell v. Hall* (1) is that if the Crown does grant representative institutions by Letters Patent and does not reserve powers of revocation, the Court will not assume such a power. If, however, as in the present case pursuant to s. 1 of the Malta (Letters Patent) Act, 1936, an express power of revocation is reserved and is exercised, the Crown has on revocation the same powers as were vested in it before the grant in question, and can provide for the exercise of the legislative or other powers in whatever form, or by whatever authority, it may then determine. The effect of the Malta (Letters Patent) Act, 1936, was to make the grant of representative institutions contained in the Letters Patent of 1921 revocable, and it follows that on revocation by the Letters Patent of 1936 the

Crown possessed the same powers as those in virtue of which it issued the Letters Patent of 1921.

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If, contrary to the submission for the appellants, the Board accepts the respondent's view that the legal powers of the Crown are to be found in a compact—that Malta was acquired by compact—then it is submitted that the appellants are entitled to attach the greatest possible weight to the fact that ab initio the Crown assumed without challenge the power to legislate by Order in Council. [Reference was made to Hardman's History of Malta, p. 204, and to *Campbell v. Hall*. (1)] The cases subsequent to *Campbell v. Hall* (1) do not appear to carry the matter very much further: *Abeyesekera v. Jayatilake* (2), and *In re the Lord Bishop of Natal*. (3) The Crown had on August 12, 1936, power by Orders in Council and Letters Patent to legislate for the government of Malta, and the Letters Patent of August 12, 1936, which revoked the Malta Constitution Letters Patent of 1921 as amended, and which also, by s. 15 thereof, empowered the Governor to make laws for the peace, order, and good government of Malta, was a valid exercise of such power, and the enactment by the Governor of Ordinance No. 27 of 1936 was intra vires, and it was legally enforceable.

A. Berriedale Keith and *Cyril Salmon* for the respondent. As the Court of Appeal has shown, Malta was acquired for the Crown not by cession by France, but by voluntary cession or compact by the people, who applied for the protection of the British Crown. The legal position of a people who voluntarily accept British sovereignty should not be assimilated to that of a people surrendered to the Crown without consulting their will by an absolute ruler, or to that of a conquered people, over whom, as is established by *Calvin's Case* (4), the Crown possesses unfettered power of every kind. That power is based, as pointed out in that case, on the fact that by conquest the King "hath vitæ et "necis potestatem" and so may legislate at his pleasure, and

(1) 1 Cowp. 204.

(3) (1865) 3 Moo. P. C. (N. S.) 115, 148.

(2) [1932] A. C. 260, 264.

(4) (1608) 7 Co. Rep. 1.

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its acceptance in cases of cession, as in *Campbell v. Hall* (1), was based on the fact that the cessions in question were merely formal acknowledgments of conquests already achieved. To apply a rule based on conquest to the case of a people who became British subjects voluntarily is *prima facie* unreasonable; their position ought in point of law to be assimilated to that of British subjects who settle overseas. In their case it is established law that the Crown cannot legislate for the territory they occupy by prerogative, but may only confer a constitution of representative type, unless special power to confer a more limited constitution and to legislate is conferred by Act of Parliament: Act to enable Her Majesty to provide for the Government of Her Majesty's Settlements on the Coast of Africa and in the Falkland Islands, 1843 (6 & 7 Vict. c. 13, amended by 23 & 24 Vict. c. 121); British Settlements Act, 1887 (50 & 51 Vict. c. 54). These Acts do not apply to Malta.

It is significant that in the two cases next mentioned in which territory was acquired by the voluntary action of the people the claim of prerogative power to legislate was not made by the Crown. New Zealand became British by the treaty of Waitangi, 1840, but legislative power therein was exercised solely under Imperial Acts, first that of 1840, 3 & 4 Vict. c. 62; then that of 1846, 9 & 10 Vict. c. 103, leading up to the Constitution Act of 1852, 15 & 16 Vict. c. 72. British Honduras was a settlement effected on territory which under treaties of 1783 and 1786 with Spain the Crown could not claim to be British; it was only accorded colonial status at the request of its people in 1862, though British sovereignty no doubt existed earlier: see *Attorney-General for British Honduras v. Bristowe*. (2) But the Crown has never claimed legislative power over it.

On the other hand, in three cases where the power has been exercised on the basis of voluntary cession, that has been in accordance with the wishes of the people of the small native communities concerned when they applied to be annexed. Thus in 1874 the chiefs and people of Fiji applied for and

(1) 1 Cowp. 204.

(2) (1880) 6 App. Cas. 143.

received the direct rule of the Crown, and so also those of Basutoland, now governed under Order in Council of 1884, and the communities of the Gilbert and Ellice Islands in 1915. There appear to be no other cases of voluntary cession; Kenya is regarded as a colony by settlement, so that the British Settlements Act, 1887, applies to it; and Southern Rhodesia is probably a conquered colony: *In re Southern Rhodesia*. (1)

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Admitting the validity of the exercise of legislative power in these cases on the basis of the wishes of the people, they afford no authority for the case of Malta. Prior to annexation the Maltese had recreated an elective legislative body, which they believed and hoped would be recognized in the constitution to be granted by the Crown on annexation: see Hardman's History of Malta, p. 509, as to the declaration of July 10, 1811, in which the Maltese strongly protested against the loss of their representative institutions. To claim that the Crown has unlimited power over those who become subjects by voluntary cession, after having fought as allies, just as if they had been conquered enemies, runs counter to the principle of Lord Ellenborough that "the law of England is a law of liberty" (2), and the doctrine of Coke that the common law is based on reason and natural justice: *Bonham's Case*. (3) If acceptance of British sovereignty carries with it subjection to the uncontrolled power of the Crown, then no Indian prince will ever consent to the annexation of his state. When the sovereignty of Malta passed to the Crown in 1813, the new subjects were entitled to the same treatment as that accorded to British subjects who settled overseas, that is, the Crown should possess over them the full prerogative, including the whole executive prerogative, the extensive judicial prerogative, and the power to create a representative Legislature and to legislate with its consent or that of Parliament, but not the power to legislate without such consent.

The appellants, however, in their case, do not admit that acquisition by conquest or cession is a necessary condition precedent in all cases to the acquisition of prerogative power

(1) [1919] A. C. 211, 219.

(3) (1608) 8 Co. Rep. 107a, 118a.

(2) *R. v. Cobbett* (1804) 29 St. Tr. 1, 49.

J. C. to legislate for a colony. That contention seems wholly
 1938 without judicial support save, as is most significant, in a case
 SAMMUT decided during the usurpation of authority by James II.,
 v. when he took away the constitutions of Massachusetts,
 STRICKLAND. Connecticut and Rhode Island, and amalgamated them with
 New York and the New Jerseys into the Dominion of New
 England, a usurpation disowned by William III.: Keith's
 Constitutional History of the First British Empire, pp. 113-15.
 [Reference was also made to Manning's British Colonial
 Government after the American Revolution, p. 63, note ;
 and to Historical Records of Australia, Series I., vol. 10,
 pp. 816-17, for admissions by a Secretary of State of the
 non-existence of legislative power in a colony not ceded or
 conquered.]

The Court of Appeal based the power to legislate on usage. To this there are two objections. First, the Court based its view on Roman law as a source of law in Malta, but the powers of the Crown as regards legislation must be derived from the common law of England, not from the local law. Secondly, the actual period of exercise of legislative power by Order in Council or the Governor alone, which extended to 1836, coincided with a rigid censorship, precluding all criticism of the government. From 1836 legislation by the Governor was enacted with the aid of a Council, and in 1849 was constituted a Council of Government including elected representatives, who were accorded a substantial measure of control over legislation and finance; in 1887 the elected members became the majority of the Legislature. From 1849 legislation by Order in Council was confined to matters of vital importance and Imperial concern. To challenge this exercise of power would plainly have served no useful purpose, for the Maltese from the first recognized that their claim for a measure of control over their own affairs must be reconciled with the claims of Imperial defence. The reason why the case whence this appeal has arisen was brought was that the Crown had seen fit, no doubt with the authority of Parliament, to revoke the constitution of 1921, which had conferred on the Maltese responsible government in local affairs, and to

reduce Malta to the position of such places as Gibraltar, St. Helena, Basutoland, Ashanti and Cyprus after the revolt there in 1931 against royal authority. This action compelled reference to the Courts to establish the position that, in view of the mode of acquisition of Malta, the only legislative or quasi-legislative power thereover of the Crown was that applicable in respect of a settled colony—namely, the right to constitute a representative Legislature: *Kielley v. Carson and Others*. (1) [Reference was also made to Clark's Summary of Colonial Law (1834), p. 7.]

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Even, however, if it is held that by usage or otherwise the Crown possessed legislative power from 1813, that power was definitely and irrevocably taken away, save as regards those Imperial issues in respect to which it was reserved, by the issue of the Letters Patent of April 14, 1921. The two Letters Patent of that date must be read together to constitute a whole. One set, the Constitution Letters Patent, creates a Legislature with power to deal with local affairs to the exclusion of Imperial matters; the other set, constituting the office of Governor, assigns legislative power over these matters reserved from the power of the Legislature to the King in Council and the Governor. In the former case only a limited power to revoke or amend was reserved by s. 68, applicable to matters of Imperial interest, and under the rule in *Campbell v. Hall* (2) and *In re the Lord Bishop of Natal* (3) the Crown thus irrevocably surrendered the power to legislate in respect of non-reserved matters.

It is claimed that the power was restored by s. 1 of the Malta (Letters Patent) Act, 1936, which gave full power to revoke or amend the Constitution Letters Patent, 1921, and by the consequent revocation by Letters Patent of August 12, 1936, of the Constitution Letters Patent of 1921, whereupon the Crown recovered its former legislative power, just as if such power had been reserved in the Letters Patent of 1921. But this contention ignores the fact that the Act of 1936 does not purport to have retrospective effect, and that it is contrary

(1) (1841-3) 4 Moo. P. C. 63. (3) 3 Moo. P. C. (N. S.) 115, 148.
(2) 1 Cowp. 204.

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and consent of Parliament or the advice of the Privy Council, as in the Letters Patent of 1831 and 1833 providing Legislatures for British Guiana and Ceylon : Clark's Summary of Colonial Law, pp. 264, 568. This form, which was widely used and is preserved even in the present constitution (1931) of Ceylon, is quite inconsistent with the assertion of a mere right to legislate contemporaneously with the Letters Patent ; it is an assertion that the grant of a Legislature is not to be regarded as a surrender of the power of Parliament or the Crown to legislate during the existence of that Legislature, or to make other provision for the constitution. That the power is the basis of constitutional changes is conclusively proved by the successive changes in the Ceylon constitution, each instrument expressly referring to this reservation as the basis of power, and there are other recent cases, such as the Nigeria (Legislative Council) Order in Council, 1922, the Sierra Leone (Legislative Council) Order in Council, 1924. [Reference was also made to *Bishop of Natal v. Green*. (1)] It is clear that, when legislative power is concerned, the insertion of an express reservation thereof is essential, and that the reservation of power to revoke or amend gives authority to effect constitutional changes only in regard to matters other than legislative power. When, therefore, Parliament in the Malta (Letters Patent) Act, 1936, provided only for power to revoke and amend, it conferred no authority to confer legislative power on the Governor or King in Council with regard to the matters which the Letters Patent of 1921 transferred to the control of the local Legislature.

It is submitted, therefore, that s. 15 of the Letters Patent of August 12, 1936, which provides that " The Governor " may make laws for the peace, order and good government of " Malta " is wholly ultra vires, since the Crown did not acquire on the annexation of Malta power to legislate or to delegate such power to the Governor. If, however, it should be held that such power was acquired by usage or otherwise, nevertheless by the constitution of 1921 such power, as regards matters not reserved therein from the power of the Legislature,

was surrendered, and has not since been effectively revived, so that Ordinance No. 27 of 1936, which imposes taxation and does not deal with a reserved matter, is null and void.

Cyril Salmon followed. If the Ordinance in question can be justified under the British Settlements Act, 1887, all the other argument becomes more or less academic, but it is submitted that the Ordinance cannot be sustained under that Act. Sect. 2 of the Act gives Her Majesty in Council power to legislate, and by s. 3 all or any of the powers given may be delegated, but only to three or more persons within the Settlement. But the delegation by the Letters Patent of August 12, 1936, is to the Governor alone, and it is submitted that such a delegation is not justified by the Act. There is the further point that the Act of 1887 applies only to cases where there is no Legislature in existence.

The difference between voluntary cession as in the case of Malta and cession as contemplated in the cases cited is that voluntary cession is really the negation of cession at the point of the sword.

Sir Donald Somervell A.-G. was stopped while replying.

1938. June 30. LORD MAUGHAM L.C. stated that for reasons which would be delivered later their Lordships would humbly advise His Majesty that the appeal should be allowed.

July 25. The reasons for the judgment of their Lordships were delivered by LORD MAUGHAM L.C. This is an appeal from a judgment of His Majesty's Court of Appeal of Malta, delivered on March 4, 1938, reversing the judgment given on October 11, 1937, by the Civil Court of Malta, First Hall.

The appeal raises the question of the validity of a customs duty imposed under an Ordinance made by the Governor of Malta—namely, the Ordinance No. 27 of 1936. The respondent, who was the plaintiff in the action, raised the question by importing certain articles, of the value of 3s. 9d., suitable for use in connection with Coronation festivities. The appellant, Edgar Sammut, a Collector of Customs, exacted a duty on

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and consent of Parliament or the advice of the Privy Council, as in the Letters Patent of 1831 and 1833 providing Legislatures for British Guiana and Ceylon : Clark's Summary of Colonial Law, pp. 264, 568. This form, which was widely used and is preserved even in the present constitution (1931) of Ceylon, is quite inconsistent with the assertion of a mere right to legislate contemporaneously with the Letters Patent ; it is an assertion that the grant of a Legislature is not to be regarded as a surrender of the power of Parliament or the Crown to legislate during the existence of that Legislature, or to make other provision for the constitution. That the power is the basis of constitutional changes is conclusively proved by the successive changes in the Ceylon constitution, each instrument expressly referring to this reservation as the basis of power, and there are other recent cases, such as the Nigeria (Legislative Council) Order in Council, 1922, the Sierra Leone (Legislative Council) Order in Council, 1924. [Reference was also made to *Bishop of Natal v. Green*. (1)] It is clear that, when legislative power is concerned, the insertion of an express reservation thereof is essential, and that the reservation of power to revoke or amend gives authority to effect constitutional changes only in regard to matters other than legislative power. When, therefore, Parliament in the Malta (Letters Patent) Act, 1936, provided only for power to revoke and amend, it conferred no authority to confer legislative power on the Governor or King in Council with regard to the matters which the Letters Patent of 1921 transferred to the control of the local Legislature.

It is submitted, therefore, that s. 15 of the Letters Patent of August 12, 1936, which provides that " The Governor " may make laws for the peace, order and good government of " Malta " is wholly ultra vires, since the Crown did not acquire on the annexation of Malta power to legislate or to delegate such power to the Governor. If, however, it should be held that such power was acquired by usage or otherwise, nevertheless by the constitution of 1921 such power, as regards matters not reserved therein from the power of the Legislature,

was surrendered, and has not since been effectively revived, so that Ordinance No. 27 of 1936, which imposes taxation and does not deal with a reserved matter, is null and void.

Cyril Salmon followed. If the Ordinance in question can be justified under the British Settlements Act, 1887, all the other argument becomes more or less academic, but it is submitted that the Ordinance cannot be sustained under that Act. Sect. 2 of the Act gives Her Majesty in Council power to legislate, and by s. 3 all or any of the powers given may be delegated, but only to three or more persons within the Settlement. But the delegation by the Letters Patent of August 12, 1936, is to the Governor alone, and it is submitted that such a delegation is not justified by the Act. There is the further point that the Act of 1887 applies only to cases where there is no Legislature in existence.

The difference between voluntary cession as in the case of Malta and cession as contemplated in the cases cited is that voluntary cession is really the negation of cession at the point of the sword.

Sir Donald Somervell A.-G. was stopped while replying.

1938. June 30. LORD MAUGHAM L.C. stated that for reasons which would be delivered later their Lordships would humbly advise His Majesty that the appeal should be allowed.

July 25. The reasons for the judgment of their Lordships were delivered by LORD MAUGHAM L.C. This is an appeal from a judgment of His Majesty's Court of Appeal of Malta, delivered on March 4, 1938, reversing the judgment given on October 11, 1937, by the Civil Court of Malta, First Hall.

The appeal raises the question of the validity of a customs duty imposed under an Ordinance made by the Governor of Malta—namely, the Ordinance No. 27 of 1936. The respondent, who was the plaintiff in the action, raised the question by importing certain articles, of the value of 3s. 9d., suitable for use in connection with Coronation festivities. The appellant, Edgar Sammut, a Collector of Customs, exacted a duty on

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these articles in terms of the Ordinance 27 of 1936. This duty was paid under protest, and on April 21, 1937, the action was commenced. The trial judge decided that the Ordinance was valid, but the decision of the Court of Appeal was to the contrary effect. Hence the present appeal.

The nature of the dispute can be shortly stated. It was admitted by counsel for the respondent in his learned argument that the Island of Malta (which for the present purpose includes Gozo) became a British Possession in the year 1813 under circumstances which their Lordships will consider in a little more detail later. In the years 1849, 1887, and 1903 certain limited rights of administration were conferred on the inhabitants by Letters Patent and Orders in Council made by the Crown. In the year 1921 Letters Patent (to be called for convenience the principal Letters Patent) were issued by His Majesty, dated April 14, 1921, establishing in Malta a Legislature consisting of a Senate and Legislative Assembly to deal with local matters. The material section (s. 41) conferring the legislative powers on the Senate and Legislative Assembly began in the following terms: "It shall be lawful "for Us and Our successors, by and with the advice and "consent of the Senate and Legislative Assembly, subject to "the provisions of these Our Letters Patent, to make Laws, "to be entitled ' Acts,' for the peace, order and good govern- "ment of Malta, with the following limitations, namely, that "the said power to make Laws shall not extend to matters "(hereinafter referred to as reserved matters) touching the "public safety and defence of Our Empire and the general "interests of Our subjects not resident in Malta, or touching "the general interests of Our subjects resident in Malta and "the preservation and continuance of peace, order and good "government therein in the event of such interests and such "peace, order and good government being endangered, or the "carrying on of responsible government under these Our "Letters Patent being prejudiced, by reason of any grave "emergency which the Secretary of State shall be satisfied "has arisen and continues to exist within the Island, and "(without prejudice to such general limitation) shall not

"extend to the following matters in particular or any of
"them."

There followed a description of some seventeen matters which were so reserved. They included merchant shipping, external trade, immigration, coinage, and the appointment and remuneration of judges of the superior Courts, and the removal of such judges. Any law passed by the Legislature had to be presented for His Majesty's assent to the Governor, and express provisions were contained in relation to that assent and to the power of the Crown to disallow any law within one year from the date of the Governor's assent thereof. By s. 68 there was reserved to the Crown "full power and "authority from time to time to revoke, alter or amend "section 41 and all other provisions relating to reserved "matters or Imperial property and interests, and also sections "40, 56, 57, and 63" of the Letters Patent as the Crown might think fit. And further there was reserved to the Crown by the section full power and authority from time to time to amend s. 41 so as to provide that the establishment, discipline, control and administration of the police or any particular matter relating to the subjects aforesaid or any of them, should be a reserved matter. Sect. 40 related to the matter of language; s. 56 related to religious tolerance; s. 57 (like s. 40) to the matter of language; and s. 63 to the payment out of the Consolidated Revenue Fund of Malta of the reserved Civil List (which provided for Imperial services and the judiciary). Except as above stated the Letters Patent did not contain any clause enabling the King to revoke or amend the same.

It should be noted that under s. 41 the limitations on the power to make laws related to matters touching (amongst other things) the general interests of subjects resident in Malta, and to the carrying on of responsible government under the Letters Patent in the event of such interests, and peace, order and good government being prejudiced by reason of any grave emergency which might exist in the Island; and that all provisions relating to "reserved matters" could be revoked, altered or amended. As regards the reservations,

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 1938 given in a work of high authority seems to be correct :
 SAMMUT "Malta, acquired by cession, was long governed under a
 v. "Crown Colony régime, but in 1921 on the analogy of the
 STRICKLAND. "new Indian Constitution a complex system of Dyarchy was
 ——— "introduced" : Anson's Law and Custom of the Constitution,
 4th ed., Keith, vol. ii., Part II., p. 74.

Separate Letters Patent, also dated April 14, 1921, were issued constituting the office of Governor and Commander-in-Chief. These were amended by subsequent Letters Patent dated August 9, 1930. In that year the Crown, acting under s. 41 (above stated), and on the view of the Secretary of State that there was a grave emergency, suspended the full operation of the constitution. After an inquiry by a Royal Commission, and subject to certain alterations by Letters Patent not material to the present purpose, responsible government as regards local matters was restored by the Crown in 1932. Doubts as to the validity of certain Letters Patent relating to Malta, subsequent to those above referred to, were removed by the (Imperial) Act, 1932. These Letters Patent and the Malta (Temporary Government) Order in Council, 1930, were declared to have been validly passed and to have been within the powers reserved to His Majesty. If any vestige of doubt could have previously existed as to the validity of the principal Letters Patent, and in the view of their Lordships there was none, it was removed by this Act.

In the year 1933 it was again considered necessary by the Crown to suspend the Constitution of Malta, and the existing Ministers were removed from office by the Governor. Doubts seem to have arisen as to the validity of this proceeding, and the Malta (Letters Patent) Act of 1936 was passed, and received the Royal Assent on July 14, 1936. By s. 1 of this Act it was provided as follows : "The Malta Constitution "Letters Patent, 1921, shall, notwithstanding any limitation "imposed by section 68 thereof, have effect as if there were "thereby reserved to His Majesty full power to revoke or "amend by any further Letters Patent any or all of the

"provisions of the Malta Constitution Letters Patent, 1921, as
"subsequently amended."

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By the Letters Patent of August 12, 1936, His Majesty revoked the principal Letters Patent, and made provision for the government of Malta, including the exercise of legislative powers by the Governor under s. 15 thereof. The section is in these terms: "The Governor may make laws "for the peace, order, and good government of Malta." By s. 17 there was reserved to the Crown the (concurrent) right, with the advice of the Privy Council, from time to time to make laws for the peace, order, and good government of Malta. The repeals included several Letters Patent, which were revoked without prejudice to anything lawful done thereunder. The Letters Patent providing for the government of Malta and so repealed were the following:—

1. The Malta Constitution Letters Patent (the principal Letters Patent).

2. The Malta Constitution (Amendment) Letters Patent, 1933.

3. The Malta Constitution (Amendment) Letters Patent, 1934.

4. Letters Patent dated March 18, 1936.

Three Letters Patent constituting the office of Governor and Commander-in-Chief of Malta were also repealed—namely, Letters Patent respectively dated April 14, 1921, August 9, 1930, and August 16, 1934.

The Governor then purported by Ordinance 27 of 1936 to impose customs duties on certain foreign articles imported into Malta, and it is not disputed that that Ordinance was within the powers purported to be conferred on the Governor by the Letters Patent of August 12, 1936. It is contended by the respondent, however, that there was no power in the Crown on that date to provide by Orders in Council or by Letters Patent for the government of Malta, or to confer on the Governor any power of making laws, except, it may be, in respect of the matters reserved to the Crown under the express provisions of the principal Letters Patent. It is not in dispute that those Letters Patent were validly revoked

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under the express power of revocation resulting from the provision in s. 1 of the Malta (Letters Patent) Act, 1936, and the effect of the contention of the respondent, if correct, is that since August 12, 1936, Malta has been devoid of any legislative body. The question how far, and to what extent, certain of the provisions of the Letters Patent of August 12, 1936 (on this hypothesis) may be valid, as having been issued under the powers reserved by the principal Letters Patent and by the Malta Constitution Act, 1932, has not been investigated before their Lordships.

The judge in the First Hall (Dr. L. A. Camilleri), after a careful consideration of the arguments, decided in favour of the appellants. He held, first, that Malta must be regarded as a colony acquired by cession ; secondly, that a ceded colony is by common law prerogative of the Crown subject to legislation by Order in Council or Letters Patent ; thirdly, that the revocation of the principal Letters Patent of 1921 not being in dispute, the rights of the Crown as regards legislation reverted to the position which had existed immediately prior to the principal Letters Patent being issued ; and fourthly, that as the result of the revocation the Royal Prerogative as regards legislation was fully restored, and that the Letters Patent of August 12, 1936, were accordingly valid. The action was, therefore, dismissed with costs.

In the Court of Appeal a different view was taken. First, they were of opinion that Malta was not acquired by the Crown by cession, but by " compact " between the inhabitants and the Crown. Secondly, they held nevertheless that by " uniformity of usage " from 1836, if not before, the Crown had acquired the right of legislating for the inhabitants of Malta, and accordingly the contention that the Crown never had the right of legislating for Malta by Letters Patent prior to 1921 was rejected. Thirdly, they held on the authority of *Campbell v. Hall* (1) that by the grant of representative institutions by the principal Letters Patent, without reserving a power of revocation, the Royal Prerogative was irrevocably surrendered. Fourthly, that the revocation of the principal

Letters Patent by virtue of s. 1 of the Malta (Letters Patent) Act, 1936, was insufficient to restore the prerogative right to legislate, or to confer a new right, since that section did not contain any words conferring a right to legislate after the revocation. Finally, the Court held that the Royal Prerogative which existed prior to 1921 having only been acquired as a title by usage, it "evidently lapsed with the enactment of "autonomy and cannot be revived." The appeal was accordingly allowed, and judgment was given in favour of the appellant. There was no order as to costs.

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Before their Lordships the respondent not only supported the contentions on which the Court of Appeal decided the case, but further argued, (1.) that the title of the Crown to Malta did not rest on cession, but "on the voluntary "acceptance by the people of Malta (allied with the Crown "against France which had acquired sovereign authority), "of British protection, and later of formal sovereignty"; (2.) that such an acquisition of sovereignty conferred on the Crown no constitutional authority to legislate, or to impose taxation; (3.) that the exercise of rights by the Crown involving power to legislate and tax was in law a mere usurpation; (4.) that in any case the effect of the principal Letters Patent was to extinguish all legislative and taxation authority, except in regard to those matters specially reserved; and (5.) that power to restore authority to the Crown in non-reserved matters could thereafter be granted only by Parliament.

It should be observed at the outset that the question as to the extent of the Royal Prerogative in the case under consideration is a pure question of English common law, upon which the principles of Roman law, which were invoked in the Court of Appeal, could have very little influence. The sovereignty of Malta admittedly passed to the Crown not later than the year 1813. It is material to consider the circumstances under which this event took place in order to determine the extent of the Royal Prerogative at that time. The Maltese people are not unnaturally proud of their early history, and of the fact that the title of the Crown to

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Malta is, as has been truly said, "the very reverse of a right of conquest." It is not necessary to recapitulate the known historical documents, which are set out in great detail in Hardman's History of Malta. It is sufficient to say that their Lordships, for the present purpose, are content to accept the elaborate statement of the position of Malta in the British Empire contained in the judgment of the Court of Appeal of Malta, delivered in *Strickland v. Galea* on June 22, 1935, and cited in the judgments of the trial judge and of the Court of Appeal in the present case. Whatever may have been the juridical position in the period before 1813, when Malta was successively in the possession of the Order of the Knights of St. John of Jerusalem, of the first French Republic (1798), of a number of victorious co-belligerents assisting the insurgent Maltese, of the King of the Two Sicilies, of Great Britain (1801), of the Knights of St. John, and again of Great Britain, it is certain that in 1813 a decisive step was taken when Sir Thomas Maitland, on his arrival as Governor in Malta, published a Declaration in the name and on behalf of King George III. to the effect that the King had determined "henceforth to recognise the people of Malta and Gozo as subjects of the British Crown and as entitled to its fullest protection." To this was added the assurance that the King's intention was "to secure to the Maltese, in the fullest manner, the free exercise of their religion, to maintain their ecclesiastical establishment, to introduce such ameliorations in the proceedings of the Courts of Law as would secure to everyone the certainty of speedy and effective justice, and to make such improvements in the laws themselves as past experience or change of circumstances might render necessary and advisable." It may be noted that the last sentence certainly gives no support to the view that there was a promise, still less "a pact," which would involve the grant of representative institutions with substantial law-making powers to the Maltese people. It must be borne in mind that the population of the Island was only that of a moderate town in England, that its size is about that of the Isle of Wight, and that its people, however brave, could not have

hoped to resist without assistance the attack of a first-rate power. It is clear that as a whole they welcomed the Declaration, though at this date Great Britain was still engaged in a life and death struggle with Napoleon and the Battle of Leipzig had not yet been fought. A year later the Treaty of Paris (1814) was signed recognizing the British claims as regards Malta, and that treaty was ratified by the Congress of Vienna in 1815. Ever since that time Malta has been occupied by British troops, and there has been a Governor in control appointed from Great Britain. It has become a British fortress of great strategical importance, a station for troops, and a first-class harbour for naval and civil purposes. It seems to their Lordships that counsel for the respondent was acting wisely when he admitted without hesitation that since 1813 the sovereignty of the Island had been in the Crown, and when he said little or nothing in support of the contention set forth in the respondent's Case to the effect that the subsequent exercise of rights on behalf of the Crown was in law a usurpation.

What, then, was the true nature of the title of the Crown to the sovereignty of Malta? In answering this question it is important to bear in mind that we are considering a matter of substance rather than one of names or labels. The contention of the respondent on this part of the Case is founded on the proposition that the prerogative of the Crown to legislate by Orders in Council and Letters Patent for the Government of a possession (using the word in the widest sense) is restricted to cases where the possession was acquired either by conquest or by cession, but the word "cession" is employed by the respondent in this connection in a limited sense so as to exclude a voluntary cession by the general consent of the people. This involves the division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent or desire of the inhabitants. Their Lordships must observe that there seems to be no authority in any case or recognized text-book on constitutional law for this distinction. The leading writers have always divided the possessions of the

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Crown outside the United Kingdom into those acquired by conquest, by cession, and by settlement. The statute law of this country has naturally been based on the same view. The British Settlements Act, 1887, s. 6, defines "British Settlement" for the purposes of the Act as meaning "any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession." The Foreign Jurisdiction Act, 1890, s. 1, confers on the Crown in divers foreign countries jurisdiction in "the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory." It can with difficulty be supposed that the Legislature in these uses of the word "cession" was employing it as referring only to a limited class of cessions. Moreover, the Act of 1887 (ss. 2 and 5) empowered Her Majesty in Council in the widest terms to make laws, and to make, alter, and revoke orders for the purposes of the Act in every settlement. If the contention as to the limited meaning of the word "cession" is correct, it would seem to follow that British possessions acquired by voluntary cession being therefore "British Settlements" are in several respects in a less advantageous position as between themselves and the Crown than possessions acquired by a formal cession from some independent sovereign with or without the consent of the people. It seems clear to their Lordships that in both these Acts the Legislature is using the word "cession" as including cases of voluntary cession.

The text-books also use the word in the wider and general sense. The passage already cited from Anson, 4th ed., Keith, vol. ii., Part II., p. 74, is an example (see also *Ibid.* p. 64), and others could be found in the same work. It is needless to multiply instances, for until the present case no one seems to have distinguished or divided cessions to the Crown in the way suggested. In Halsbury's Laws of England, 2nd ed., vol. xi., tit. Dominions, Colonies, Possessions, etc., p. 11, will be found a list of eighteen possessions of the Crown acquired

by cession, including cases of cession by tribal chiefs; and it is to be noted that the learned author states that "Malta" "must be regarded as a cession." (See also Halsbury, 2nd ed., vol. vi., p. 477.)

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It may be said with truth that cases of voluntary cession, that is, cession otherwise than from a sovereign power, are rare, and it is urged that the case has been neglected by text-book writers and not noticed by the Legislature. It seems right, therefore, to consider whether there is anything to support the respondent's contention on this point, based on the principle of constitutional law formulated in the general proposition that the Crown by virtue of the Royal Prerogative (apart from the effect of the British Settlements Act, 1887) is *prima facie* entitled to legislate for possessions acquired by conquest or cession, but is not so entitled in the case of Settlements. The line of distinction here has always been based on the circumstance that English settlers wherever they went carried with them the principles of English law, and that English common law necessarily applied in so far as such laws were applicable to the conditions of the new colony. The Crown clearly had no prerogative right to legislate in such a case. Where, however, the territory was acquired by cession or conquest, more particularly where there was an existing system of law, it has always been considered that there was an absolute power in the Crown, so far as was consistent with the terms of cession (if it was a case of that kind), to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown. (See Blackstone's Commentaries, 21st ed., vol. i., pp. 107, 108. It may be noted that the learned author refers to "conquered" or ceded countries "without any suggestion that the case of voluntary cession required separate consideration.) It seems to their Lordships to be reasonably plain that the principle which excluded cases of settlement from the Royal Prerogative has no application to cases where there has been a cession in the popular sense, whether with or without the assent of the inhabitants, and that there is no valid ground for the

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distinction suggested between the case of Malta and other cases of cession.

There remains, however, a second point which was strongly argued on behalf of the respondent. It may be stated as follows: If the Crown by an exercise of prerogative has conferred representative institutions on the inhabitants of a territory which has been acquired by the Crown without, however, reserving, in addition to a power of revoking the Letters Patent or the Order in Council, a power of resuming the Royal Prerogative of legislation, is it within the power of the Crown after the revocation to legislate for the territory? The contrary is contended on behalf of the respondent. It is suggested as a general proposition that, whenever responsible government is conceded by the Crown to a colony or possession, the Royal Prerogative to legislate by Letters Patent or Orders in Council comes to an end and is irrevocably lost or surrendered by the Crown, unless a special reservation is made in the grant. It may be stated at once that there is no authority for this view, and that the statements in the text-books relied on in support of it are capable of a different meaning. The case relied on is the well known decision of *Campbell v. Hall* (1), where Lord Mansfield delivered the judgment, and this authority must now be considered. It related to the island of Grenada, taken by the British arms in open war from the French King and surrendered upon capitulation. Letters Patent, dated March 26, 1764, commissioned General Melville as Governor of Grenada. He was given power to set up a Legislature as specified in a previous proclamation under the Great Seal, dated October 7, 1763, whereby (inter alia) the King had empowered and directed the Government of Grenada by Letters Patent under the Great Seal to summon general assemblies of the representatives of the people of Grenada so soon as the circumstances of the colony would allow, and with their consent to make laws for the public peace, welfare, and good government of the colony and its inhabitants. There had also been a second proclamation of March 26, 1764, containing a recital of a survey of the

islands and their division into allotments, as an invitation to purchasers to come in and take up properties on terms specified in the proclamation. After these three instruments had been published, namely, on July 20, 1764, Letters Patent were issued purporting to impose by virtue of the Royal Prerogative a duty of $4\frac{1}{2}$ per cent. on all sugars exported from the island, in lieu of certain duties previously levied by the French King. The question was whether these Letters Patent were valid.

Lord Mansfield, in delivering judgment, said that upon full consideration the Court was of opinion that before the issue of the Letters Patent of July 20, 1764, the King had precluded himself from the exercise of a legislative authority over the island of Grenada. He then proceeded to consider the terms of the two proclamations, and after this examination used these words (1): "We therefore think, that by the "two proclamations and the commission to Governor Melville, "the King had immediately and irrecoverably granted to all "who were or should become inhabitants, or who had, or "should acquire property in the island of Grenada, or more "generally to all whom it might concern, that the subordinate "legislation over the island should be exercised by an assembly "with the consent of the governor and council, in like manner "as the other islands belonging to the King."

He added that "through the inattention of the King's "servants, in inverting the order in which the instruments "should have passed . . ." (that is, in issuing the Letters Patent of July 20, 1764, after the Proclamation instead of before) "the last Act is contradictory to, and a violation of the "first, and is, therefore, void." It is plain that this authority is dealing only with a case where the Crown, after having granted representative institutions to the colony, was purporting to exercise by Royal Prerogative a concurrent right of legislation, though no such right had been reserved; and, indeed, Lord Mansfield found that there was language to be found in the Letters Patent confirming the Proclamations showing that no such concurrent power was being reserved.

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It seems to their Lordships that this case in no way tends to support the respondent's present contention; and, with all respect to the Court of Appeal, they are unable to agree with their statement that it is an established constitutional principle based on *Campbell v. Hall* (1) that the grant of representative institutions once made, the Crown is immediately and irrevocably deprived of its right to legislate by Letters Patent or Orders in Council, unless there is an express reservation of a right to that effect. The true proposition is that, as a general rule, such a grant without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist. Nor is it in doubt that a power of revoking the grant must be reserved or it will not exist. The statements made in the text-books based on the authority of *Campbell v. Hall* (1), properly understood, do not go beyond the decision, since they are not dealing with the hypothesis that the grant of representative institutions has been lawfully revoked.

The Court of Appeal, however, lays stress upon an argument based upon what they call "the general and constant rule" followed in the issue of instruments granting representative "government to colonies and other possessions whenever it "is meant to preserve the Royal Prerogative." There are, it is said, two reservations, one, a reservation of full power to make laws as may seem necessary, and so that such laws shall be of the same force and effect as if the grant has not been made, and, two, a power to revoke, alter, or amend the grant. It is desirable to set out an example of the usual form of such reservations, taking it from the Malta Letters Patent of 1903: "We hereby reserve to ourselves, Our heirs and "successors, Our undoubted right, power, and authority to "make, by and with the advice of Our Privy Council, all such "laws for the peace, order, and good government of Malta "as to Us, Our heirs and successors, may seem necessary, "and all such laws shall be of the same force and effect in "Malta as if these Letters Patent had not been made. And

"we do hereby reserve to Ourselves, Our heirs and successors,
 "full power and authority from time to time to revoke, alter,
 "or amend these Our Letters Patent as to Us or Them shall
 "seem meet."

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There can be no doubt as to the meaning and effect of the second reservation. The Crown by virtue of it can curtail or extend the powers of the legislative body entrusted with law-making or administrative duties by the instrument in which the reservation is found. Since all such powers could be annulled, it is clear that there is no limit to the right of curtailing or extending the powers; and in effect this preserves the prerogative of making laws by alteration or amendment of the Letters Patent while they are still, at least to some extent, in force. If once they are revoked it is urged that the Crown no longer has any right to make laws for the possession in question, unless the first reservation has been inserted as well as the second. It seems to their Lordships that this is a misapprehension as to the object of the first reservation. It is not dealing mainly, if at all, with the reservation of a prerogative right after the Letters Patent have been revoked, but with the reservation of a concurrent right from the start to legislate for the peace, order, and good government of the possession while the Letters Patent are in full force. This is plain from the context, and from the phrase that the laws so made shall be of the same force "as if these Letters Patent had not "been made." It may be added that there is a cogent reason for holding that the reservation has no application to the case where there has been a complete revocation of the Letters Patent, because that would appear to postulate a reliance on a clause contained in the instrument after the instrument itself had been annulled.

Their Lordships, for these reasons, have come to the conclusion that neither the authority of *Campbell v. Hall* (1), nor the text-books on constitutional law, nor the argument based on the forms in use by the Crown in granting representative government to colonies and other possessions, can

(1) 1 Cowp. 204.

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be relied on as tending to establish the proposition that after the revocation of the principal Letters Patent on August 12, 1936, the Crown was divested of all legislative authority in regard to Malta, except perhaps in regard to matters expressly reserved by the principal Letters Patent. The problem which arises is to be solved by a consideration of the surrounding circumstances, some of them special to Malta as a fortress, by a careful examination of the nature of the matters which were entrusted in 1921 to the Senate and Legislative Assembly of Malta, and of those matters which were reserved to the Crown as touching the public safety and defence of the Empire, and the general interests of the King's subjects visiting or resident in Malta, and by asking the question whether it should be inferred that, if the Letters Patent were revoked, the inhabitants of Malta were to be left without a Legislature, and without means of raising a revenue for essential local purposes, unless and until Imperial Parliament should intervene. There might be matters urgently calling for the local administration of a Governor long before an Act of Parliament could be passed. Above all, it seems very unlikely that on instituting a complex system of dyarchy by Letters Patent it could have been intended that, if that part of the law-making and administrative power which was being confided to a representative body came to an end, the Crown would be left in the enjoyment of truncated and mutilated powers, and with no means of providing for the peace, order, and good government of Malta. For these reasons their Lordships have come to the conclusion that there is no valid ground, either on principle or authority, for holding that the Royal Prerogative had been so far extinguished, when the principal Letters Patent were issued in 1921, that, after they were revoked, the Prerogative did not exist. The right to legislate in relation to local matters was doubtless suspended while the Letters Patent were in force, for the reason indicated by Lord Mansfield in the passage already quoted—namely, that so to legislate would be “contradictory to and a violation” of the instrument granting the powers; but there is nothing

in it to preclude the exercise of the Royal Prerogative as soon as the Letters Patent in that respect cease to be in force.

It is proper to add that their Lordships have considered the effect of the British Settlements Act, 1887, but, for the reasons given, there seems to be no good ground for holding that Malta has not been acquired "by cession or conquest"; and Malta is therefore not within the definition of British Settlement contained in s. 6 of that Act.

On the grounds above stated their Lordships thought it right humbly to advise His Majesty to allow the appeal and to restore the order of the learned judge in the First Hall. They also followed the course as to costs adopted by the Court of Appeal, and for like reasons they made no order as to the costs of the appeal.

Solicitors for appellants : *Burchells*.

Solicitors for respondent : *Blount, Petre & Co.*

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 (INTERVENING).

ON APPEAL FROM THE COURT OF APPEAL FOR
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Canada—British Columbia—Natural products marketing legislation—Scheme of control and regulation—Imposition of licence fees—Regulation of particular businesses entirely within the Province—Intra vires of the Provincial Legislature—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 (2.), (3.); s. 92 (9.), (13.), (16.)—Natural Products Marketing (British Columbia) Act, 1936, R. S. B. C., c. 165.

The Natural Products Marketing (British Columbia) Act, 1936, the scheme of which is to enable the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions, including the power to fix and collect licence fees, is in pith and substance an Act to regulate particular businesses entirely within the Province, and is therefore intra vires of the Provincial Legislature under s. 92 (13.) of the British North America Act, 1867, which gives the Provincial Legislature the exclusive right to legislate in relation to "property and civil "rights in the Province."

Further, the regulation of trade within the Province being valid, the method of regulation by a system of licences is also admissible, and it is no objection that licence fees should be charged either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes, and the Act is accordingly intra vires of the Provincial Legislature under s. 92 (9.) of the British North America Act, 1867. The licence fees can also be supported as validly imposed, on the ground that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92 (13.) and (16.) of the Act of 1867.

Natural products as defined in the Act are not confined to

* *Present* : LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

natural products produced in British Columbia, but the Act is confined to dealings with such products as are situate within the Province. "Transportation" is confined to the passage of goods whose transport begins within the Province to a destination also within the Province.

Judgment of the Court of Appeal for British Columbia affirmed.

APPEAL (No. 81 of 1937) from a judgment of the Court of Appeal of British Columbia (August 10, 1937), reversing a judgment of Manson J. in the Supreme Court of British Columbia (May 29, 1937).

The appellants, George Walkem Shannon, Thomas Hedley McDonald, and Matthew Blackwood McDermid, dairy farmers carrying on business in British Columbia, were affected by a milk marketing scheme approved by the Lieutenant-Governor in Council under the Natural Products Marketing (British Columbia) Act, 1936. The scheme set up the Lower Mainland Dairy Products Board, the respondents, who were the defendants in the action, in which the appellants as plaintiffs claimed a declaration that the Act was ultra vires of the Legislature of the Province, and that they were under no obligation to obtain licences from the defendant Marketing Board or to comply with any of their demands; and they further claimed an injunction to restrain the defendants from interfering with them.

The Attorney-General for the Province of British Columbia intervened in the proceedings.

The trial judge (Manson J.) declared the Act to be ultra vires of the Provincial Legislature, and he decided in favour of the plaintiffs.

Pending the defendants' appeal to the Court of Appeal the Lieutenant-Governor in Council, pursuant to s. 3 of the Constitutional Questions Determination Act, R. S. B. C., 1924, c. 46, on June 2, 1937, referred the following question to the Court of Appeal: "Is the Natural Products Marketing (British Columbia) Act, as amended by the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, "and the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), or any of the "provisions thereof, and in what particular or particulars or "to what extent, ultra vires of the Legislature of the Province

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"of British Columbia?" The Court of Appeal (Martin C.J.B.C., McPhillips and Macdonald J.J.A.) answered that question in the negative by a judgment delivered on July 8, 1937, and reported at (1937) 52 B. C. R. 179.

Following their decision in the reference case the Court of Appeal gave a formal judgment in the present case in conformity with that decision, and they accordingly allowed the appeal.

1938. June 30; July 1, 4. *A. P. Duffes K.C.* for the appellants. The problem for consideration is very similar, from the opposite angle, to that which was decided by this Board in *Attorney-General for British Columbia v. Attorney-General for Canada*. (1) The main question turns on the interpretation of the familiar provisions as regards legislative powers contained in the British North America Act, 1867, and the interpretation of certain provisions of ss. 91 and 92 of that Act in relation to the Natural Products Marketing (British Columbia) Act, R. S. B. C., 1936, c. 165, designed to provide for the appointment of Boards in British Columbia, or in parts thereof, to deal with schemes for marketing natural products. [Reference was made to the provisions of the Natural Products Marketing (British Columbia) Act, 1934, as amended to 1936, and to s. 91 (2.), (3.) and (29.), and s. 92 (2.), (10.), (13.) and (16.), of the British North America Act, 1867.] The Act in question does contravene the provisions of the British North America Act which provide that exclusive legislative power rests with the Parliament of Canada as regards regulation of trade and commerce and the raising of money by any mode or system of taxation. The Act does interfere, or provide for giving the Natural Products Boards power to interfere, with trade and commerce affecting the relationship between Provinces themselves. Further, the Act does involve a power to impose indirect taxation. The powers of the Lieutenant-Governor in Council, and the powers of the Board appointed by him, are not restricted in any way as regards finance. The definitions in the Act of 1936 are

(1) [1937] A. C. 377.

as wide as they could be, and there could not be wider provisions than those of ss. 3 and 4. While there is a provision about the marketing of natural products *within* the Province, yet it is submitted on construction that the power given would involve interference with marketing between British Columbia and any other Province. Interference to the extent that would result from the provisions of this Act would be contrary to the trade and commerce head of s. 91 of the British North America Act. The question must be one of degree to some extent. There is practically no restriction in the power as to the methods that such Boards may adopt and the orders they may give within the Province. With regard to the fixing of licences, they may be imposed upon any basis that the Board may choose. The test as to indirect taxation has been laid down in a number of cases; there is indirect taxation if it is found that, while apparently directly imposed on people, the result is not that they themselves will bear the burden, but that they will pass it on to somebody else.

The Act is *ultra vires* in the form in which it is found in c. 165 of the R. S. B. C., 1936. With regard to the "trade and commerce" point, it is submitted that there are two main fallacies at the root of the judgment of the Appeal Court. First, as to the essence of the judgment of this Board in *Attorney-General for British Columbia v. Attorney-General for Canada* (1); because in that case Lord Atkin, in delivering the judgment of the Board, pointed out that the Dominion Legislation had failed, it seems to have been assumed by the Court of Appeal in the present case that when the Provincial Legislature set out with the intention of dealing with trade in the Province they could scarcely fail, because this Board said that the totality of legislative power in relation to all matters rested with the Dominion and the Provincial Parliaments. The appellants themselves rely on what the Board said in the Dominion case (1) as being in their favour. The Dominion Act was in essence, it is submitted, an Act to regulate Dominion trade and commerce;

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but although it was that, this Board held that it was none the less ultra vires because in attempting to exercise that legislative power the Dominion had infringed the exclusive power of the Provincial Legislatures, not merely in an incidental way, but essentially. Here, the appellants seek to convert that line of reasoning, and apply it to the present case, assuming that the purpose here was to deal with property and civil rights in the Province, and to authorize interference and action by Boards within the Province. It is submitted that if it is found that the scope of the Act authorized interference, vital and essential interference, with the regulation of trade and commerce in the Dominion, that is, outside the Province in question, then there is a situation similar to that which the Board dealt with in the Dominion case. (1)

Regard must be had not only to what is intended to be done, but how it is attempted. The basis of the judgments of the Court of Appeal is that it is assumed that, because the object of the Act is to restrict its interference to within the Province, that that broadly saves it, although that interference under the terms of the Act may be such as to be a material interference with people and things outside the Province. The mere fact that interference within the Province will affect people outside, the mere fact that people outside may be incidentally affected as traders, may not be enough ; but if people outside the Province may be, as a natural effect of this Act, interfered with as traders not merely incidentally but essentially, then it is submitted that that may be fatal.

The definition of natural products seems in its terms to cover products which are not native to the Province. There is an assumption in the judgment on appeal that the Act does not cover anything but native products of the Province.

The second fallacy in the judgments under appeal is the failure to appreciate what, it is submitted, is the clear distinction between the natural effect of an Act like the present and that of the Act in question in *Gallagher v. Lynn*. (2) Under the provisions of the present Act the Marketing Board would be free and unrestricted as to method, and in the matter of

(1) [1937] A. C. 377.

(2) Ibid. 863.

finance. The raising of money by licence fees would be an imposition of a financial burden on traders, and would not be an expense of running the scheme. The essence of this Act is an interference with trade and commerce in products not necessarily native to the Province, and the powers, financial and otherwise, necessarily interfere with trade and commerce outside the Province.

With regard to the taxation question, an imposition that may be nominally of the nature of direct taxation may quite easily become indirect taxation. Further, direct taxation may easily conflict with s. 91 of the British North America Act if it is not in a true sense for local revenue purposes, but is essentially, or to a material extent, for a purpose that could be classed fairly as the regulation of trade and commerce in the sense in which those words are used in s. 91.

Reliance is placed on the general reasoning in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1), a very similar case to the present. [Reference was also made to *Attorney-General for British Columbia v. Attorney-General for Canada* (2); *Gallagher v. Lynn* (3); *Citizens Insurance Co. of Canada v. Parsons* (4); *Russell v. The Queen* (5); *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ltd.* (6); *Rex v. Caledonian Collieries* (7); *Attorney-General for Manitoba v. Attorney-General for Canada* (8); *Attorney-General for British Columbia v. Canadian Pacific Ry. Co.* (9); *Cotton v. The King* (10); and *Burland v. The King*. (11)]

In the present case there is practically a surrender by the Provincial Legislature of its legislative responsibility to another body; surely the limit in that type of delegation has been reached in this case, where the delegation is to an executive body: *In re The Initiative and Referendum Act.* (12)

Applying the above cited authorities as applicable to the

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| (1) [1931] Can. S. C. R. 357, 359. | (7) [1928] A. C. 358, 361-2. |
| (2) [1937] A. C. 377, 386. | (8) [1925] A. C. 561. |
| (3) [1937] A. C. 863. | (9) [1927] A. C. 934, 938. |
| (4) (1881) 7 App. Cas. 96, 112. | (10) [1914] A. C. 176. |
| (5) (1882) 7 App. Cas. 829. | (11) [1922] 1 A. C. 215. |
| (6) [1933] A. C. 168. | (12) [1919] A. C. 935. |

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various branches of the argument, the decision appealed from is in conflict with a number of them ; and as a matter of interpretation the provisions of ss. 91 and 92 of the British North America Act, 1867, lead to the result that Manson J. was right, and the appeal should be allowed.

W. B. Farris K.C., Wilfrid Barton K.C. and W. E. Haskins for Attorney-General for British Columbia (intervener) were not required to argue on the question of delegation.

The appellants' contentions are limited by the following admissions : (a) It is within the competency of the Provincial Legislature to enact legislation regulating the marketing and production of natural products so long as it does not encroach on the powers of the Dominion ; and (b) the present Act is a bona fide endeavour on the part of the Province to regulate the marketing and production of natural products within the jurisdiction of the Province. The intervener's argument falls under three heads. First, the Province has the sole right, within its proper limits, to pass legislation concerning the marketing and production of natural products. Secondly, the pith and substance of the Act under discussion is to control the marketing and production of natural products in British Columbia, within the confines of the Province, and within the legislative authority of the Province, and is intra vires. Thirdly, the section of the Act permitting the Board to charge licence fees to those engaged in marketing and production of natural products is intra vires. Nothing need be added on the first proposition, about which there can be no doubt. With regard to the second head, *Attorney-General of Manitoba v. Manitoba Licence Holders' Association* (1) shows that the fact that the Act does affect outside interests does not affect its validity provided that it is within the Provincial jurisdiction. That leads to the question of the analysis of the Act to ascertain what it was in pith and substance. In dealing with the Act its whole intent must be looked at, and local conditions taken into account. The pith and substance is contained in ss. 2, 4, 9 and 15. As to "transportation," the Province is under this Act limited to Provincial railways,

(1) [1902] A. C. 73, 80.

bus lines and roads, which are not controlled by Federal authority, and which do not interfere generally with trade and commerce as between the Provinces. [Reference was made to *Attorney-General for Ontario v. Reciprocal Insurers* (1) and *MacLeod v. Attorney-General for New South Wales*. (2)]

Everything has been done to make it clear that there is no intention to encroach on the Dominion prerogative, and the Act remains strictly within the Provincial rights. There are three views in regard to the third heading: (a) The licence fees imposed are direct taxes within s. 92 (2.) of the British North America Act, 1867. (b) If not a tax within s. 92 (2.), they are "licences" which come within s. 92 (9.) of the Act of 1867. (c) If the fees do not come within either (a) or (b), then they are service or administrative charges properly made under s. 92 (13.) of the Act of 1867, which deals generally with property and civil rights in the Province. The fees may also come under head (16.) of s. 92, which deals with "generally all matters of a merely local or private nature "in the Province." It is submitted that it is purely a licence within *Hodge v. The Queen* (3), and that the Province has the right to licence: *Reference re The Natural Products Marketing Act, 1934, and its Amending Act, 1935*. (4) If the Province thus had the right to licence—and that was confirmed by this Board—the licence fee must be incidental to the giving of the licence. [Reference was also made to *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*. (5)]

Wilfrid Barton K.C. followed. When there are words from which it may be implied that a subordinate Legislature intends to keep within its own sphere of legislative jurisdiction, the words must be given their effect, and they limit the enactment within the legislative sphere of the subordinate Legislature. For the effect in legislation of the words "subject to," see *James v. Cowan*. (6)

A. P. Duffes K.C. replied. The transportation provisions in this Act clearly show where the legislative powers have

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(1) [1924] A. C. 328, 345.

(2) [1891] A. C. 455.

(3) (1883) 9 App. Cas. 117.

(4) [1936] Can. S. C. R. 398, 411.

(5) [1931] Can. S. C. R. 357, 362.

(6) [1932] A. C. 542, 558.

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been exceeded. It is a necessary qualification under s. 92 (2.) or (9.) that the licence fees must be for Provincial revenue ; the revenue obtained from the licence fees in question is not for Provincial revenue, but for another purpose altogether. The test is whether there is inherent in the Act taxation of an indirect nature. *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1) is clearly distinguishable from the present case, and the effect of that case, and of those following it, is to make the present matter an interference with the taxation rights of the Dominion Legislature.

The respondents did not appear.

July 27. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a decision of the Court of Appeal for British Columbia reversing a decision of Manson J., who had given judgment in the action in favour of the plaintiffs, the present appellants. The appellants were dairy farmers carrying on their business in the Province of British Columbia, and were affected by a Milk Marketing Scheme approved by the Lieutenant-Governor in Council under the Natural Products Marketing (British Columbia) Act, Chapter 34, of the Statutes of 1936. The scheme set up the Lower Mainland Dairy Products Board (the defendants), and in the action the plaintiffs claimed a declaration that the Act was ultra vires of the Legislature of the Province ; that the plaintiffs were under no obligation to obtain licences from the defendants, or comply with any of their demands ; and they further claimed an injunction to restrain the defendants from interfering with them. In the proceedings the Attorney-General for the Province intervened, and he alone was represented as respondent before this Board. The learned trial judge decided in favour of the plaintiffs. The Court of Appeal reversed his decision, following judgments they had delivered on a reference to them by the Lieutenant-Governor in Council asking whether the Act in question was ultra vires of the Legislature of the Province. Having answered the question in the negative they, without

(1) [1931] Can. S. C. R. 357.

further discussion, allowed the appeal. The legislative history of the impugned statute is as follows. In November, 1934, the Legislature of British Columbia passed an Act entitled the Natural Products Marketing (British Columbia) Act, providing that the Lieutenant-Governor in Council might constitute a British Columbia Marketing Board, and arming the Board with powers to act in co-operation and conjointly with the Dominion Marketing Board constituted under the Dominion Act, the Natural Products Marketing Act, 1934. In November, 1935, the Governor-General in Council had referred to the Supreme Court of Canada the question whether the Dominion Act was ultra vires of the Dominion Legislature. On June 17, 1936, the Supreme Court held in *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935* (1), that it was ultra vires, and their decision was affirmed by this Board on January 28, 1937. [*Attorney-General for British Columbia v. Attorney-General for Canada*. (2)] Meantime, in April, 1936, the Legislature of British Columbia had amended the Provincial Act of 1934, which now is in the form enacted in the Revised Statutes of British Columbia, 1936, c. 165, together with an additional clause as to severability enacted in an Amendment Act of 1937, c. 41. It is not necessary to set out all the provisions of the Act in question, but reference should be made to the following definitions: " 'Marketing' includes buying and selling, shipping for sale "or storage, and offering for sale: and in respect of a natural "product includes its transportation in any manner by any "person." " 'Natural product' means any product of "agriculture, or of the forest, sea, lake, or river, and any "article of food or drink wholly or partly manufactured or "derived from any such product."

Sect. 4, sub-s. 1, of the Act provides: "The purpose and "intent of Part I. of this Act is to provide for the control "and regulation in any or all respects of the transportation, "packing, storage, and marketing of natural products within "the Province, including the prohibition of such transporta- "tion, packing, storage, and marketing in whole or in part."

(1) [1936] Can. S. C. R. 398. (2) [1937] A. C. 377.

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The scheme of the Act is to enable the Lieutenant-Governor in Council to set up a central British Columbia Marketing Board, to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products, to constitute Marketing Boards to administer such schemes, and to vest in those Boards any powers considered necessary or advisable to exercise those functions. In particular the Lieutenant-Governor in Council may vest in any Marketing Board the powers, s. 4A (d), "to fix and collect yearly, half-yearly, "quarterly, or monthly licence fees from any or all persons "producing, packing, transporting, storing, or marketing the "regulated product; and for this purpose to classify such "persons into groups, and fix the licence fees payable by the "members of the different groups in different amounts; and "to recover any such licence fees by suit in any Court of "competent jurisdiction."

Section 4A (j): "To use in carrying out the purposes "of the scheme and paying the expenses of the board any "moneys received by the board."

The attack on the Act was made on these grounds:—

(1.) That it encroaches on the class of subjects enumerated in s. 91 (2.) of the British North America Act, 1867—the regulation of trade and commerce.

(2.) That it also encroaches on s. 91 (3.)—the raising of money by any mode or system of taxation.

(3.) That without constitutional authority it delegates legislative power to the Lieutenant-Governor in Council.

It is sufficient to say upon the first ground that it is apparent that the legislation in question is confined to regulating transactions that take place wholly within the Province, and are therefore within the sovereign powers granted to the Legislature in that respect by s. 92 of the British North America Act. Their Lordships do not accept the view that natural products as defined in the Act are confined to natural products produced in British Columbia. There is no such restriction in the Act, and the limited construction would probably cause difficulty if it were sought

at some future time to co-operate with a valid Dominion scheme. But the Act is clearly confined to dealings with such products as are situate within the Province. It was suggested that "transportation" would cover the carriage of goods in transit from one Province to another, or overseas. The answer is that on the construction of the Act as a whole it is plain that "transportation" is confined to the passage of goods whose transport begins within the Province to a destination also within the Province. It is now well settled that the enumeration in s. 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province: *Citizens Insurance Co. of Canada v. Parsons* (1); *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935.* (2) And it follows that to the extent that the Dominion is forbidden to regulate within the Province, the Province itself has the right under its legislative powers over property and civil rights within the Province. The appellants did not dispute that there was a bona fide intention by the Province to confine itself to its own sphere, but they contended that, whatever the intention, the Province had in fact encroached upon the Dominion sphere. If they could have established that contention, they would have been in a stronger position. In this respect their Lordships desire to quote a passage from the opinion of Lord Atkin in the House of Lords in *Gallagher v. Lynn* (3), which was cited by Martin C.J., and which it will be convenient to bring into the line of authority on constitutional cases arising in the Dominions: "My Lords, 'the short answer to this is that this Milk Act is not a law 'in respect of' trade; but is a law for the peace, order and 'good government of Northern Ireland 'in respect of' 'precautions taken to secure the health of the inhabitants

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(1) 7 App. Cas. 96.

(2) [1936] Can. S. C. R. 398; [1937] A. C. 377.

(3) [1937] A. C. 863, 869.

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“of Northern Ireland by protecting them from the dangers
 “of an unregulated supply of milk. These questions affecting
 “limitation on the legislative powers of subordinate parliaments
 “or the distribution of powers between parliaments in a
 “federal system are now familiar, and I do not propose to
 “cite the whole range of authority which has largely arisen
 “in discussion of the powers of Canadian Parliaments. It
 “is well established that you are to look at the ‘true nature
 “‘and character of the legislation’: *Russell v. The Queen* (1);
 “‘the pith and substance of the legislation.’ If, on the view
 “of the statute as a whole, you find that the substance of
 “the legislation is within the express powers, then it is not
 “invalidated if incidentally it affects matters which are
 “outside the authorized field. The legislation must not under
 “the guise of dealing with one matter in fact encroach upon
 “the forbidden field. Nor are you to look only at the object
 “of the legislator. An Act may have a perfectly lawful
 “object, e.g., to promote the health of the inhabitants, but
 “may seek to achieve that object by invalid methods, e.g.,
 “a direct prohibition of any trade with a foreign country.
 “In other words, you may certainly consider the clauses
 “of an Act to see whether they are passed ‘in respect of’
 “the forbidden subject. In the present case any suggestion
 “of an indirect attack upon trade is disclaimed by the
 “appellant. There could be no foundation for it. The true
 “nature and character of the Act, its pith and substance,
 “is that it is an Act to protect the health of the inhabitants
 “of Northern Ireland; and in those circumstances, though it
 “may incidentally affect trade with County Donegal, it is not
 “passed ‘in respect of’ trade, and is therefore not subject
 “to attack on that ground.”

The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore intra vires of the Province.

The second objection made to the Act was that it provided for the raising of money by a mode or system of taxation, which is one of the class of subjects reserved to the Dominion

by s. 91 (3.) of the British North America Act. The contention is directed to the power to impose licence fees which may be vested in Provincial boards by the Lieutenant-Governor in Council under s. 4A (d) of the British Columbia Act. The answer made was that the legislation was valid under the powers given to the Province to legislate as to the following classes of subjects (s. 92 (2.)) "direct taxation within the Province in order to the raising of a revenue for Provincial purposes"; (s. 92 (9.)) "shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for Provincial, local, or municipal purposes"; (s. 92 (13.)) "property and civil rights in the Province"; or, finally (s. 92 (16.)) "matters of a merely local or private nature in the Province." Their Lordships do not consider it necessary to support this legislation by reference to s. 92 (2.). Without deciding the matter either way, they can see difficulties in holding this to be direct taxation within the Province. But on the other grounds the legislation can be supported. If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, i.e., by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes. On this part of the case their Lordships, with great respect, think that the present Chief Justice, then Duff J., took a somewhat narrow view of the Provincial powers under s. 92 (9.) in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1), where he says (2): "on the other hand, the last-mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities

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(2) Ibid. 364.

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“for the control of trade—even local or provincial trade.” It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And, if licences for the specified trades are valid, their Lordships see no reason why the words “other licences” in s. 92 (9.) should not be sufficient to support the enactment in question. The impugned provisions can also, in their Lordships’ opinion, be supported on the ground accepted by Martin C.J. in his judgment on the reference—namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92 (13.) and (16.). The Chief Justice refers to fees on land registration, and mining and prospecting certificates. Another example might be the exaction of market tolls on the establishment of a new market. On these grounds the attack upon the Act based on the powers to exact licence fees must be held to fail.

The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act. Martin C.J. appears to have disposed of this objection very satisfactorily in his judgment on the reference, and their Lordships find no occasion to add to what he there said.

For these reasons the appeal fails and should be dismissed,

and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for the intervener: *Gard, Lyell & Co.*

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